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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1951

No. _____

MICHAEL COHEN,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

Jurisdiction is invoked under Title 28, Sec. 1291 and decision of this Court in Stack v. Boyle, 96 L. Ed. 7, (No. 400, October Term, 1951).

OPINIONS BELOW

Ex Parte Cohen 191 F(2) 300; Later

Opinions below are unpublished, but are copied and in the appendix to Applications To Justice Douglas.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 46, Rules of Criminal Procedure:

"RULE 46. BAIL

(a) Right to Bail.

(2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail."

SHORT STATEMENT OF FACTS

Your petitioner was convicted in the Southern District of California, Central Division (Los Angeles) of making false and fraudulent income tax returns as to his "net income" for the years 1946, 1947 and 1948, and of "knowingly and wilfully making and causing to be made false and fraudulent statements and representations in a matter within the jurisdiction of the Treasury Department, which appears on a document designated "Net Worth Statement, Years 1945, 1946, 1947 and 1948. Disbursements Years 1945, -1946, -1947, -1948." which was executed "by the defendant." The last charge was contained in Count VI of the indictment. The document was not required by law, but was solicited from his Tax Accountant by Internal Revenue Agents who solicited the same. It was given to them by the accountant.

The trial court imposed a penalty of five years imprisonment and $10,000 fine, and denied bail on appeal. Application for bail pending appeal was then made to Chief Judge Denman, of the United

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States Court of Appeals for the Ninth Circuit. Judge Denman heard the matter in a hearing lasting several days, the government being represented by the United States Attorney and the defense by his counsel. Upon the first hearings of the matter, Judge Denman denied bail.

No question was raised by the United States Attorney as to Judge Denman, sitting as a single judge, hearing the matter and his decision of denial was accepted.

Thereafter this court rendered its decision in Stack v. Boyle, No. 400, October Term, 1951, and a petition was filed with Judge Denman to reconsider his former decision, which was buttressed by a more complete analysis of the transcript of the trial, a showing that a conviction was based upon a so-called "net worth" statement prepared by a tax accountant working closely with intelligence agents of the Internal Revenue Bureau; that petitioner, who had only gone to the sixth grade in school, was induced to sign it by the efforts of the agents, that it was not truly a net worth statement that could be made the basis of prosecution or conviction on any counts. There was a further showing that the Internal Revenue Code was meant to be exclusive and that Congress did not intend prosecutions to be made under Title 18, Section 1001 where it had set up a complete system of penalties for Internal Revenue violations.

The application for reconsideration was made upon notice to the United States. Judge Denman invited written briefs in lieu of oral argument, and this was accepted by both the Government and defense. Both sides consented (by failing to raise any objection) to a single judge

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hearing the application. After five weeks of study, Judge Denman found that there was a substantial question on appeal, as presented by the matters on rehearing, and entered an order fixing bail in the sum of $5,000.00. The order provided that the form of the bond should be approved by the United States Attorney and the bond approved by a District Judge at Los Angeles. When the petitioner's counsel presented the bond to the United States Attorney for his signature, he declared he would not sign it. He made statements to the press and to counsel that Judge Denman had arrogated to himself a power that should be exercised only by the Court, sitting as a court, and not by a single judge. He at first wired Judge Denman to stay the "mandate," but later wired asking for a stay of the order to give him an opportunity to file other papers. Judge Denman issued a two-day stay of his order.

Thereafter the United States Attorney filed a petition with the Court for rehearing of Judge Denman's order and for a stay pending hearing on an application for the entire court to deny bail pending appeal, or, if it overrules this application, to increase the amount of bail substantially.

Upon this ex parte application of the Government, the Court entered an order to rehear and review Judge Denman's order, and set it down for December 11, 1951, all judges to sit except Judge Denman, and further staying the order fixing bail until the determination thereon.

Thus, the defendant, now in jail almost six months upon an appeal which the Chief Judge of the United States Court of Appeals for the Ninth Circuit holds to present a substantial question on appeal, still

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languishes in jail, his time not counting on his sentence. Since "relief of this type of case must be speedy if it is to be effective," (Stack v. Boyle), we petition for certiorari.

QUESTIONS PRESENTED BY THIS PETITION

1. Whether a single judge of the Court of Appeals has jurisdiction to fix bail pending appeal.

2. Whether the fixing of bail on appeal by a single judge or justice, pursuant to Rule 46 (a) 2, is res judicata and cannot be changed or altered by other members of the same court, sitting as the court, and can only be done upon a showing of factors which were not, and could not be, presented to the court prior to its making its order fixing bail and establishing the same.

3. Whether, upon the granting of such bail any other judge of equal position or the Court in which he sits, may stay and review his order, and reverse it, change it, or modify it.

4. Whether, upon the showing of a substantial question upon appeal, the petitioner is entitled to be released upon bond forthwith, as a matter of right, as fixed by the chief judge of the Court of Appeals.

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REASONS FOR GRANTING THE WRIT

This case raises questions important to the administration of Criminal Justice.

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It also raises the question of the jurisdiction or right of judges of equal position to review the actions of a single judge of that court.

It also invokes the supervisory power of this ccurt in criminal proceedings.

ARGUMENT

The Federal Rules of Criminal Procedure, Rule 46 (a) 2 established the right to bail on appeal by a single judge of the Court of Appeals, and the right to determine that a substantial question exists. No right is given to his associates to review or revoke his decision, nor to stay his order.

> "Relief in this type of case must be speedy if it is to be effective," says Mr. Chief Justice Vinson, in Stack v. Boyle, 96(Adv. Op.) L. Ed. 7, 10.

But, giving the court or associates of the one judge the power to review the decision which is virtually an appeal therefrom would destroy the relief which the right to bail,afforded by the rules, has sought to establish, and Congress has approved.

The purpose in the rules is to permit a single justice or judge to act in bail matters and to relieve an otherwise heavily burdened court with matters that can, and should, be handled by a single judge. If the questions presented are troublesome the single judge, in his discretion, can refer the matter to the court.

In United States v. Motlow, 10 Fed. (2d) 657, at page 659, Mr.

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It also raises the question of the jurisdiction or right of judges of equal position to review the actions of a single judge of that court.

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ARGUMENT

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In United States v. Motlow, 10 Fed. (2d) 657, at page 659, Mr.

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Justice Butler, speaking as a Circuit Justice, said as follows:

> "As to supersedeas and bail after sentence. It is the purpose of the law--any many statutes, federal and state, have been enacted--to safeguard litigants so far as possible against erroneous judgments. Review in appellate courts is favored in all cases where the grounds on which it is claimed are assigned in good faith on advice of counsel that in law they are valid and well taken; and parties properly seeking review are not to be burdened by avoidable expense, loss, sacrafice, or punishment."

In Christoffel v. United States, 190 Fed. (2d), at 590, the court said, speaking of bond on appeal of Christoffel:

> "And in a criminal case in which a sentence of imprisonment is involved, there is a public interest against denial of consideration on appeal of substantial questions as to the lawfulness of the conviction. For if the conviction is erroneous it is abhorrent to justice that a defendant shall nevertheless suffer such a penalty for the crime charge.

In a hearing before Justice Jackson, after the Second Circuit Court of Appeals denied bail in the Smith Act cases, Justice Jackson granted bail pending a hearing in this Honorable Court. (95 L. Ed. 1379).

In the American Bar Association Journal of November 1951, page 844, in a review of the case of Christoffel v. United States, D.C., September 20, 1951, by Stephens, C. J., it is stated:

> "However, the Court held that having once deter-

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mined that a substantial question was involved in the case, it could not properly revoke its order admitting defendant to bail or add to the conditions defined therein except upon a showing of factors which would make the defendant's appearance undependable. The Government had failed to make such a showing and its motion that defendant be denied bail or furnish a surety in addition to the deposit of $10,000 was denied."

The denial of bail to this petitioner, pending appeal, is a denial of a substantial right granted by Rule 46 (a) (2) and should not be limited, hampered, hamstrung, stalled, or reviewed by an application to the court.

Rule 46 (a) (2), provides as follows:

"(a) Right to Bail.

(2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or judge or justice allowing bail may at any time revoke the order admitting the defendant to bail."

We pray for certiorari and judgment sustaining Chief Judge Denman's order of November 27, 1951.

Respectfully submitted,

MORRIS LAVINE

Morris Lavine
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1951

No. 468

MICHAEL (MICKEY) COHEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Your Petitioner, Michael Cohen, respectfully petitions for a hearing before this Honorable Court from the final judgment and order of the United States Court of Appeals for the Ninth Circuit handed down December 13, 1951, setting aside by six other members of the Court the order of Chief Judge William Denman granting bail to the petitioner pending appeal in the sum of $5,000, and vacating and setting aside the entire order and denying bail pending appeal.

JURISDICTION

Jurisdiction is conferred by Section 1254 (1) of Title 28, U. S. Codes and by the interpretation and decision of this Court in Stack v. Boyle, 96 L. Ed. (ad. op.) 7.

An order granting bail was entered November 27, 1951, by the Honorable William Denman, Chief Judge of the United States Court of Appeals for the Ninth Circuit. The bail was fixed at $5,000.

The order setting aside Judge Denman's order was entered by six other judges of the United States Court of Appeals for the Ninth Circuit on December 13, 1951, following a hearing on December 11, 1951, in which Judge Denman did not participate.

OPINIONS OR ORDERS BELOW

Ex Parte Cohen, 191 Fed. (2d) 300; Later opinions below are unpublished, but are copied and in the appendix to prior Application to Justice Douglas. Copies of the orders are contained in the record now being prepared by the Clerk of the United States Court of Appeals.

RULES AND REGULATIONS INVOLVED

RULE 46, Rules of Criminal Procedure:

"RULE 46. BAIL

(a) Right to Bail.

(2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail."

*

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SHORT STATEMENT OF THE CASE

Your petitioner was tried and convicted in the United States District Court in and for the Southern District of California, Central Division, on three counts of violation of Rule 26, Sec. 145(b) and one count of violation of Sec. 1001, Title 18, U. S. Codes.

On July 9, 1951, the judgment and sentence was pronounced whereby he was committed to the custody of the United States Marshal for a period of five years and fined $10,000.00. On July 10th, 1951, petitioner duly and regularly filed his Notice of Appeal in the District Court of the United States, and made application for bail in the District Court of the United States, which application was heard and denied by the District Judge, on July 13, 1951.

In Counts 1, 3 and 5 of the indictment of which he was convicted, he was charged with wilfully and knowingly attempting to defeat and evade a large part of the income tax alleged to be due and owing by him to the United States of America for the calendar years 1946, 1947 and 1948, by filing a false and fraudulent income tax return. In connection with Count 6, he was charged with causing to be made a false and fraudulent statement in a matter within the jurisdiction of the Treasury Department, in violation of Title 18 U. S. Codes, Section 1001, in that he signed a so-called "net worth statement" as to his cash and expenditures for his tax auditor, Harry Sackman, which was turned over by the auditor to Intelligence Agents of the Treasury Department.

Application was made to Chief Judge William Denman, Chief Judge for the United States Court of Appeals for the Ninth Circuit, to grant bail pending appeal. The petitioner is informed and believes,

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and therefore alleges, that his that his then counsel, Glen A. Lane and Sydney M. Williams, when they arrived at the Office of the Clerk for the United States Court of Appeals for the Ninth Circuit, were asked whether they wanted the matter heard by the entire court or by an individual judge, and they replied that they wanted it heard by an individual judge since they were desirous of having a speedy determination made of the matter. Judge Denman, Chief Judge, then set the matter down for hearing and heard both the government and defense counsel, after which hearing and taking the matter under consideration he denied bail. No objection was made prior to the decision by either side to his hearing the matter as a single judge.

Present counsel were substituted into the case and filed a Petition for Reconsideration of the order denying bail, and during the pendency of the matter the trial transcript was completed and forwarded to Judge Denman. Also, this court's order and decision in Stack v Boyle came down in the interim. Judge Denman asked both sides to submit written briefs on the matters involved, and written briefs were submitted to the Court. Judge Denman then took the matter under consideration, both sides having full opportunity to be heard, and, on November 27, 1951, entered an order granting bail pending appeal and fixing the bail in the sum of $5,000.00. He further ordered that the form of the bond be approved by the United States District Attorney for the Southern District of California, Central Division.

When the bond was presented to the United States Attorney for the Southern District of California, Central Division, he declined to sign the bond, and stated to the press and to counsel for petitioner that

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Chief Judge Denman had arrogated to himself a power that existed only in the court, and that he was going to ask the entire court to set aside Jude Denman's order, and further stated that Judge Denman's handling of the matter was "unorthodox" in that the court should have heard it and not an individual judge. On the District Attorney's application, on November 28th, 1951, Judge Denman stayed his order of November 27th for two days, and in the meantime the United States District Attorney prepared and presented to the other judges of the United States Court of Appeals for the Ninth Circuit an application to revoke the order of Judge Denman and (2) in the event it did not revoke the order of Judge Denman to increase the amount of bail fixed by Judge Denman. Six other judges signed a stay order and set the case down for a hearing before the six other judges for December 11, 1951.

On December 11, 1951, Judge Denman being intentionally absent from the court proceedings, although personally in the building, the other six judges sat and heard arguments which Clifton Mathews, who presided, stated the six judges were treating the matter as though no bail had been fixed by Judge Denman and as though the matter was all before them as though it was a new proceeding. Counsel for the petitioner stated to the Court, among other things, that it was his position that the Chief Judge having made an order granting bail after a hearing thereon that order determined the matter and that the other members of the Court did not have the right to vacate his order unless there was a showing of facts newly discovered and which could not be brought to the court prior thereto.

Following the argument, the six judges took the matter under

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submission and, on December 13, 1951, entered an order vacating Judge Denman's previous order.

Judge Denman did not sit in the proceedings, nor participate in any way, and at no time revoked or set aside his order fixing bail.

QUESTIONS PRESENTED BY THIS PETITION

(1) Whether a single judge or chief judge of the Court of Appeals has full jurisdiction to hear an application for bail pending appeal and make an order fixing bail as an individual judge.

(2) Whether the order so made by the single chief judge can thereafter be reviewed, as upon an appeal, by associate judges and thereafter vacated and set aside by six associate judges who simply disagree with the chief judge's order finding that there is a substantial question on appeal and fixing bail.

(3) Whether such an order is decisive and creates rights as to all matters which were or could have been presented on the hearing granting bail and is not open to review by his associate judges prior even to carrying out the Chief Judge's order.

(4) Whether upon the showing of a substantial question upon appeal the petitioner is entitled to be released upon bond forthwith, as a matter of right, as fixed by the Chief Judge of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I

There is a conflict of opinion within the Court of Appeals for the Ninth Circuit itself which should be resolved by this Court.

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II

There is a conflict of opinion by six judges of the Court of Appeals for the Ninth Circuit with the opinions expressed in Stack v. Boyle in the Court by Justices Jackson and Frankfurter.

III

The question presented is an important question in the administration of criminal justice, as bail must be speedy to be effective.

IV

The power and authority of a Chief Judge of a Circuit is raised in question and the effect of the action by his associate judges is to constitute his associates as a supreme Court with authority to review his decision, and requires a decision of this Court in its supervisory power over criminal matters.

SPECIFICATION OF ERRORS

1. The decision of the six judges of the United States Court of Appeals for the Ninth Circuit vacating the decision of Chief Judge Denman granting bail and fixing it in the sum of $5,000 was not legally warranted in the setting of this case and was an action beyond their jurisdiction and without legal authority.

2. When a single judge hears an application for bail and each side has a full opportunity to present its views thereon, the decision granting bail gives rise to rights which must be reasonable certain as to the matters thertofore presented and should be modified only upon changed or altered circumstances arising subsequent to the first hearing as set out in Section 3143 of Title 18, U. S. Code.

3. The action of the six judges in vacating Judge Denman's order is a nullity and should be set aside.

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ARGUMENT

I

THE DECISION OF THE SIX JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT VACATING THE DECISION OF CHIEF JUDGE WILLIAM DENMAN GRANTING BAIL AND FIXING IT IN THE SUM OF $5,000.00 WAS ERRONEOUS AND AN ACTION BEYOND THEIR JURISDICTION WITHOUT LEGAL AUTHORITY.

The Federal Rules of Criminal Procedure, Rule 46(a)(2), establishes the right of a single judge of the Court of Appeals to determine that a substantial question exists upon an appeal and to grant bail pending appeal. This rule says in part:

> "Right to bail. (2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice."

Chief Judge Denman, as the Chief Judge of the United States Court of Appeals for the Ninth Circuit, heard the application for bail. No objections were made by either side to his hearing it as a single judge. Hearing was had upon notice and each side presented all matters that were available to it on the hearing, and they each had an opportunity to present any other matters that they thought could be material.

On November 27, 1951, after Judge Denman had had the matter

under submission for a period of five weeks, he made an order granting bail and fixing it in the sum of $5,000.00.

His associates under him thereafter had no right, power or authority to set down a hearing to vacate and set aside his order. Nothing new was presented. The United States Attorney first stated that Judge Denman had "arrogated" to himself a power that he did not have and "had conducted an unorthodox" procedure.

The power which the Chief Judge had "arrogated" to himself in the 'unorthodox" procedure was a power which this Court and Congress gave to the Chief Judge, and which Justices Jackson and Frankfurter specifically approved of in Stack v. Boyle, 96 L. Ed. page 7, in their concurring opinion.

In the hearing which took place on December 11th, 1951, in which the six judges sat but in which Judge Denman did not participate, the attention of the court was called to the statements appearing in Stack v. Boyle, as follows:

> "It is not appropriate for the Court as a whole to fix bail where the power has been given to individual judges and Justices to do so."

Chief Judge Mathews stated that while these were views expressed by Justices Jackson and Frankfurter, they were not the "opinion of the Court" as such and indicated that they therefore were not controlling upon the Court of Appeals.

It is therefore necessary that this Court grant a hearing to determine the right and the power of a court of appeals and the powers of Chief Judge Denman in this matter.

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In the Court's opinion, through Mr. Chief Justice Vinson, in Stack v. Boyle, 96 L. Ed. (ad. op.) 7, at page 10, Chief Justice Vinson stated:

> "Relief in this type of case must be speedy if it is to be effective."

But, bail on appeal would be a mere mockery if the Chief Judge of the court granting bail and fixing it could have his order vacated and set aside by one or more of his associates or judges who do not have the position of Chief Judge, or even if they are of equal rank. The power given by the rule to a single judge to fix bail is a power to establish certain rights which must be certain and fixed and should not be subject to destruction except under specified conditions which Congress has indicated in Section 3143, Title 18, U. S. Codes, which provides only for additional bail because of a change of circumstances. Section 3143 is as follows:

> "When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person perviously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge, or magistrate, setting forth the cause thereof."

This section clearly shows that there was an intent in the mind of Congress that bail once fixed should remain fixed and not be altered.

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changed or modified unless a new condition arises after the person has "been previously admitted to bail." No new condition existed or were shown to exist after the order fixed by Chief Judge Denman. As a matter of fact, the petitioner remained in jail, was unable to obtain his release to get out, although he presented a bail bond to the United States District Attorney for his approval as to form only, and the United States District Attorney refused to sign the same. Petitioner was, and has been at all times, ready, willing and able to make bond and had the bond ready and authorized by a recognized surety company ever since November 28, 1951.

Rule 46(a)(2) does not give any power to other judges to change, alter, modify, or review as an appellate court the order of its single Chief Judge. It is actually unthinkable that such a situation should or could occur, and reflects on the power which Congress has given to a Chief Judge, and in fact to any single judge to hear and determine and fix bail.

Section 45 of Title 28, U. S. Codes, provides that:

" (a) The circuit judge senior in commission shall be the chief judge of the circuit.

(b) The chief judge shall have precedence and preside at any session of the court which he attends."

It is unseemly in the administration of criminal justice that other judges could revoke and set aside and modify his orders granting and fixing bail. It would leave the question of bail and its granting highly uncertain, as occurred in the present case. There was no intent by Congress to give associates of one judge the power to review the decision of his

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associate judge or judges, resulting actually in an appeal therefrom

Here there was no showing made by the United States Attorney other than a dissatisfaction with the order of the Chief Judge. Nothing was presented which could not have been amply presented to the Chief Judge at the hearing before him. Mere dislike or dissatisfaction of a judge's order granting bail should not permit the Government to obtain a review and a reversal of that order except by an appeal to the Supreme Court. The idea that a single judge should hear and determine these matters presents an opportunity for speedy determination thereof.

In United States v. Motlow, 10 Fed. (2d) 657, at page 659, Mr. Justice Butler, speaking as a Circuit Justice, said as follows:

> "As to supersedeas and bail after sentence. It is the purpose of the law--and many statutes, federal and state, have been enacted--to safeguard litigants so far as possible against erroneous judgments. Reveiw in appellate courts is favored in all cases where the grounds on which it is claimed are assigned in good faith on advice of counsel that in law they are valid and well taken; and parties properly seeking review are not to be burdened by avoidable expense, loss, sacrifice, or punishment."

In Christoffel v. United States, 190 Fed. (2d), at 590, the court said, speaking of bond on appeal of Christoffel:

> "And in a criminal case in which a sentence of imprisonment is involved, there is a public interest against denial of consideration on appeal of substantial questions as to the lawfulness of the conviction. For if the conviction is erroneous it is abhorrent to justice that a defendant shall nevertheless suffer such

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a penalty for the crime charged."

In a hearing before Justice Jackson, after the Second Circuit Court of Appeals denied bail in the Smith Act cases, Justice Jackson granted bail pending a hearing in this Honorable Court. (95 L. Ed. 1379).

In the American Bar Association Journal of November 1951, page 844, in a review of the case of Christoffel v. United States, D.C., September 20, 1951, by Stephens, C.J., it is stated:

> "However, the Court held that having once determined that a substantial question was involved in the case, it could not properly revoke its order admitting defendant to bail or add to the conditions defined therein except upon a showing of factors which would make the defendant's appearance undependable. The Government had failed to make such a showing and its motion that defendant be denied bail or furnish a surety in addition to the deposit of $10,000 was denied."

The denial of bail to this petitioner pending appeal is a denial of a substantial right granted by Rule 46(a) (2) and should not be limited, hampered, hamstrung, stalled, or reviewed by an application to the court.

We submit that the questions are one of great importance in the administration of criminal justice, and should be determined by this Court immediately, and that the petitioner should be allowed his liberty on bail forthwith in the sum of $5,000.00, as fixed by the Chief Judge, being the same amount as was found by the Chief Judge of the

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Ninth Circuit, as being sufficient.

Respectfully submitted,

MORRIS LAVINE

Morris Lavine
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1951

No. 468

MICHAEL (MICKEY) COHEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REVISED/AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CCURT OF APPEALS FOR THE NINTH CIRCUIT

Your Petitioner, Michael Cohen, respectfully petitions for a hearing before this Honorable Court from the final judgment and order of the United States Court of Appeals for the Ninth Circuit handed down December 13, 1951, setting aside by six other members of the Court the order of Chief Judge William Denman granting bail to the petitioner pending appeal in the sum of $5,000, and vacating and setting aside the entire order and denying bail pending appeal.

JURISDICTION

Jurisdiction is conferred by Section 1254 (1) of Title 28, U. S. Codes and by the interpretation and decision of this Court in Stack v. Boyle, 96 L. Ed. (ad. op.) 7.

An order granting bail was entered November 27, 1951, by the Honorable William Denman, Chief Judge of the United States Court of Appeals for the Ninth Circuit. The bail was fixed at $5,000.

The order setting aside Judge Denman's order was entered by six other judges of the United States Court of Appeals for the Ninth Circuit on December 13, 1951, following a hearing on December 11, 1951, in which Judge Denman did not participate.

OPINIONS OR ORDERS BELOW

Ex Parte Cohen, 191 Fed. (2d) 300; Later opinions below are unpublished, but are copied and in the appendix to prior Application to Justice Douglas. Copies of the orders are contained in the record now being prepared by the Clerk of the United States Court of Appeals.

STATUTES AND RULES AND REGULATIONS INVOLVED

RULE 46, Rules of Criminal Procedure for the District Courts of the United States, "RULE 46. BAIL

(a) Right to Bail.

(2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail."

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RULE 39, Rules of Criminal Procedure for the District Courts of the United States:

"RULE 39. SUPERVISION OF APPEAL

(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail."

Section 145, Title 26, U.S.C.A. - subsection (b), as follows:

"§ 145. Penalties

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3809, of Title 26, U. S. Code

"SEC. 3809. VERIFICATION OF RETURNS; PENALTIES OF PERJURY.

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"(a) Penalties. -- Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

"(b) Signature Presumed Correct. -- The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return statement, or other document was actually signed by him.

"(c) Verification in Lieu of Oath. -- The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required."

(b) Section 51(d), 145(c) and 1630 of such code are hereby repealed.

(c) The amendments made by this section shall be applicable with respect to any return, statement, or document filed after the date of the enactment of this Act."

Section 1001, Title 18, U. S. C. A.

"§ 1001. Statements or enteries generally.

Whoever, in any matter within the jurisdiction of any depart-

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ment or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

*

SHORT STATEMENT OF THE CASE

Your petitioner was tried and convicted in the United States District Court in and for the Southern District of California, Central Division, on three counts of Violation of Rule 26, Section 145(b) and one count of violation of Section 1001, Title 18, U. S. Code.

On July 9, 1951, the judgment and sentence was pronounced whereby he was committed to the custody of the United States Marshal for a period of five years and fined $10,000.00. On July 10, 1951, petitioner duly and regularly filed his notice of appeal in the District Court of the United States, and made application for bail in the District Court of the United States, which application was heard and denied by the District Judge, on July 13, 1951.

In Counts 1, 3 and 5 of the indictment of which he was convicted, he was charged with wilfully and knowingly attempting to defeat and evade a large part of the income tax alleged to be due and owing by him to the United States of America for the calendar years 1946, 1947 and 1948, by filing a false and fraudulent income tax return. In connection with Count 6, he was charged with causing to be made a false and fraud-

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ulent statement in a matter within the jurisdiction of the Treasury Department, in violation of Title 18 U.S. Codes, Section 1001, in that he signed a so-called "net worth statement" as to his cash and expenditures for his tax auditor, Harry Sackman, which was turned over by the auditor to Intelligence Agents of the Treasury Department.

In support of Count 6, of the indictment, the Government introduced Exhibit 20, which was a statement prepared by Harry Sackman but executed by the defendant without any declaration, however, that it was made under the penalty of perjury. It was turned over by the auditor, Mr. Sackman, to the Special Intelligence Agents at the office of Mr. Sackman. Objection was made to its admissibility in the trial and also motions were made for judgments of acquittal on the basis that the government had failed to carry its burden of proof as to any of the counts in the indictment and as to counts of knowingly and willfully attempting to evade and defeat a part of his income tax, it was asserted that there was no probable basis for the net worth of the defendant at the beginning of any taxable year alleged in the indictment and that there was no showing of either knowing or willful attempt to evade taxes. The motions for judgment of acquittal, both at the close of the Government's case and at the close of the defendants case, were denied.

It was also contended that Exhibit 20 did not come within the scope of Section 1001 of Title 18.

Other errors were assigned in the trial of the case, including errors in Exhibit 210A, which was introduced in evidence and which the defense asserted was incorrectly compiled on testimony that had no factual basis in the record. Although the defendant's defense was that

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he had borrowed large sums of money from different people and it was definitely established in the defense of the case as well as from other witnesses that the defendant borrowed money from others, Exhibit 210A failed to give credit to the defendant for money borrowed from others and not repaid during the taxable years, and these sums were charged as though they were income. (R. Tr. 733 to 736).

Exhibit 210A also charged the defendant with receipt of income of $66,169.00 which arose from the sale of gold minine stock. The stock was purchased from a check drawn on Michael's Haberdashery by Michael Howard. Although the government counsel asserted that he would establish that the signature was the appellant's, this was never done at any time during the trial. (R. Tr. 54 to 57). The offer to connect it up was made on Reporter's Transcript page 58, line 17 to page 59, but it was never connected.

An item of $28,350.00 was also listed on Exhibit 210A for the year 1947 and another item of $56,645 in 1948 from one John O'Rourke. The witness O'Rourke testified that he had never prior to the trial met the defendant and that he had no means of knowing whether the money which he turned over to the defendant belonged to the defendant personally or to customer's of the defendant, (R. Tr. 306, 307 - 382, 331).

There were several other errors in the admission of testimony and exhibits assigned during the trial of the case.

The trial judge, during the course of the case while the defendant was on the witness stand, made comments of a highly prejudicial nature about the defendant at the time that the United States Attorney was showing the defendant certain testimony before the Grand Jury. The defendant

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had come to court on different dates in different clothing. The trial judge told him he would be wearing the same suit tomorrow and he would land in jail if he didn't do what the judge told him to do.

The petitioner was a witness before the Kefauver Committee in its Senatorial Investigation of crime in Interstate Commerce. At the hearing an Assistant United States Attorney attended, and prior to trial motions were made to dismiss the indictment, and at the outset of the trial the motion was renewed, on the ground that the defendant has been granted immunity by being required to testify before the Kefauver Committee. The motions were overruled and the case proceeded to a trial of several days.

A motion was made, upon the defendant's conviction, for bail pending appeal before the District Judge. He denied the application for bail and thereafter counsel made application to Chief Judge William Denman to grant bail pending appeal. Both the Government counsel and Defense counsel appeared before Judge Denman in San Francisco and presented the matter at great length.

The petitioner is informed and believes,

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and therefore alleges, that his that his then counsel, Glen A. Lane and Sydney M. Williams, when they arrived at the Office of the Clerk for the United States Court of Appeals for the Ninth Circuit, were asked whether they wanted the matter heard by the entire court or by an individual judge, and they replied that they wanted it heard by an individual judge since they were desirous of having a speedy determination made of the matter. Judge Denman, Chief Judge, then set the matter down for hearing and heard both the government and defense counsel, after which hearing and taking the matter under consideration he denied bail. No objection was made prior to the decision by either side to his hearing the matter as a single judge.

Present counsel were substituted into the case and filed a Petition for Reconsideration of the order denying bail, and during the pendency of the matter the trial transcript was completed and forwarded to Judge Denman. Also, this court's order and decision in Stack v Boyle came down in the interim. Judge Denman asked both sides to submit written briefs on the matters involved, and written briefs were submitted to the Court. Judge Denman then took the matter under consideration, both sides having full opportunity to be heard, and, on November 27, 1951, entered an order granting bail pending appeal and fixing the bail in the sum of $5,000.00. He further ordered that the form of the bond be approved by the United States District Attorney for the Southern District of California, Central Division.

When the bond was presented to the United States Attorney for the Southern District of California, Central Division, he declined to sign the bond, and stated to the press and to counsel for petitioner that

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Chief Judge Denman had arrogated to himself a power that existed only in the court, and that he was going to ask the entire court to set aside Jude Denman's order, and further stated that Judge Denman's handling of the matter was "unorthodox" in that the court should have heard it and not an individual judge. On the District Attorney's application, on November 28th, 1951, Judge Denman stayed his order of November 27th for two days, and in the meantime the United States District Attorney prepared and presented to the other judges of the United States Court of Appeals for the Ninth Circuit an application to revoke the order of Judge Denman and (2) in the event it did not revoke the order of Judge Denman to increase the amount of bail fixed by Judge Denman. Six other judges signed a stay order and set the case down for a hearing before the six other judges for December 11, 1951.

On December 11, 1951, Judge Denman being intentionally absent from the court proceedings, although personally in the building, the other six judges sat and heard arguments which Clifton Mathews, who presided, stated the six judges were treating the matter as though no bail had been fixed by Judge Denman and as though the matter was all before them as though it was a new proceeding. Counsel for the petitioner stated to the Court, among other things, that it was his position that the Chief Judge having made an order granting bail after a hearing thereon that order determined the matter and that the other members of the Court did not have the right to vacate his order unless there was a showing of facts newly discovered and which could not be brought to the court prior thereto.

Following the argument, the six judges took the matter under

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submission and, on December 13, 1951, entered an order vacating Judge Denman's previous order.

Judge Denman did not sit in the proceedings, nor participate in any way, and at no time revoked or set aside his order fixing bail.

QUESTIONS PRESENTED BY THIS PETITION

(1) Whether there is an uncertainty in the Rules of Criminal Procedure for the District Courts of the United States as promulgated by the Supreme Court of the United States as to the jurisdiction of a single judge of the Court of Appeals to fix bail.

(2) Whether a single judge or chief judge of the Court of Appeals for the Ninth Circuit has full jurisdiction to hear an application for bail pending appeal and to make an order fixing bail as an individual judge.

(3) Whether such an order of a single judge is decisive and creates rights as to all matters which were or could have been presented on a hearing granting bail and not open to review by his associate judges prior even to carrying out the chief judge's order.

(4) Whether the order of a single chief judge of a Court of Appeals can thereafter be reviewed, as upon an appeal, by associate judges of the same court and thereafter vacated and set aside by the associate judges, who simply disagree with the Chief Judge's order finding there is a substantial question on appeal and fixing bail.

(5) Whether Rule 39, Rules of Criminal Procedure for the District Courts of the United States, as promulgated by the Supreme Court authorized other judges of the same court to vacate the order of a single judge and to make a new order with respect to bail, or whether that rule is merely a supervisory rule giving the power of appellate

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judges to supervise the action of District Court judges.

(6) Whether upon the showing of a substantial question upon appeal the petitioner is entitled to be released upon bond forthwith, as a matter of right, as fixed by the Chief Judge of the Court of Appeals.

(7) Whether, in any event, the record shows that Judge Denman's order is right as there are several fundamental and debateable questions on appeal, which should be decided by the Court of Appeals.

*

REASONS FOR GRANTING THE WRIT

I

There is an uncertainty in the Rules of Criminal Procedure for the District Courts of the United States as promulgated by this Court as to the power and authority of a single chief judge to fix bail on appeal.

II

There is a question of the interpretation of Rule 39, Rules of Criminal Procedure for the District Courts of the United States as to whether that rule gives associate judges of the same court jurisdiction to revoke the action of its chief judge fixing bail.

III

There is a conflict of opinion six judges of the United States Court of Appeals for the Ninth Circuit with the opinions expressed in Stack v. Boyle by Justices Jackson and Frankfurter.

IV

There is a conflict of opinion within the Court of Appeals for the Ninth Circuit itself which should be resolved by this Court.

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V

The questions raised are important questions in the administration of criminal justice, as bail must be speedy to be effective.

VI

The power and authority of a Chief Judge of a Circuit is raised in question and the effect of the action by his associate judges is to constitute his associates as a Supreme Court with authority to review his decision, and requires a decision of this Court in its supervisory power over criminal matters.

VII

In any event, the decision of Judge Denman holding that the appeal presents substantial questions and that where there are fairly debateable questions on appeal a defendant is entitled to liberty on bail should apply.

SPECIFICATION OF ERRORS

1. Rule 46(a) (2), Rules of Criminal Procedure for the District Courts of the United States authorizes a single judge or the chief judge to fix bail pending appeal, and the order thus made is final and not subject to review by his associate judges.

2. Rule 39, Rules of Criminal Procedure for the District Courts of the United States does not grant jurisdiction to other circuit judges to review and reverse the action of a single judge granting bail pending appeal and to reverse his order. The six judges of the Court of Appeals were without jurisdiction to make the order of December 13, 1951 vacating Judge Denman's order.

3. When a single judge hears an application for bail and each

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side has a full opportunity to present its views thereon, the decision granting bail gives rise to rights which must be reasonably certain as to the matters theretofore presented and should be modified only upon changed or altered circumstances arising subsequent to the first hearing as set out in Section 3143 of Title 18, U.S. Code.

3. The action of the six judges in vacating Judge Denman's order is a nullity and should be set aside.

4. In any event, Judge Denman's order was right -- the case presents several substantial questions on appeal, part of which are that Section 3809 of Title 26 was either an implied repeal or a limitation upon any prosecution under Section 1001 of Title 18, U. S. Code; Count six did not state an offense against the laws of the United States; Section 1001 of Title 18, inherently and as construed and applied in this case, is unconstitutional as being too vague, indefinite and uncertain to form the basis of a criminal prosecution; to-wit, the words "within the jurisdiction" and the word "use";

The evidence introduced under Count Six, to-wit Government's Exhibit 20, was highly prejudicial as to all counts. While it purported to be a net worth statement, it was not a true net worth statement but was only a statement of cash and loans, and therefore fatally infected the entire trial;

The evidence was insufficient as to each of the counts of the indictment. As to counts 1, 3 and 5, involving the charges of an attempt to evade taxes, there was no solid foundation of the starting point of the years involved, and not sufficient evidence to establish an attempt to evade any taxes;

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The trial court failed to instruct the jury properly as to the meaning of "net worth" and "willful", and the instructions were confusing and misleading on the question of what, if anything, constitutes net income within the meaning of the Internal Revenue Law;

The court committed prejudicial error in admiting Exhibit 210A in evidence, and there was no foundation of facts for the evidence;

The court was guilty of prejudicial error in making comments about the defendant while he was on the witness stand;

The motion to dismiss the indictment because the defendant had been a witness before the Kefauver Committee should have been granted.

These are some of the substantial issues raised by the appeal itself as to all the different counts, and Judge Denman was right in fixing bail pending appeal.

WHEREFORE, your petitioner respectfully prays that this Honorable Court grant a Writ of Certiorari and reverse the order below, and grant bail pending the hearing on this writ and during the pendency of the entire appeal.

Respectfully submitted,

MORRIS LAVINE

Morris Lavine
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 468

MICHAEL (MICKEY) COHEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF REVISED AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

We repeat by reference the Statement on Jurisdiction, Opinion or Orders Below, Statutes and Rules and Regulations Involved, and Statement of the Case as set out in our petition as though fully set out here.

ARGUMENT

THE SIX JUDGES OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT WERE WITHOUT AUTHORITY OR JURISDICTION TO SET ASIDE THE ORDER OF JUDGE DENMAN FIXING BAIL PENDING APPEAL.

Rule 46(a)(2) gives no such authority nor does Rule 39 of Rules of Criminal Procedure for the District Courts of the United States as

promulgated by the Supreme Court give such authority. Rule 46(a)(2) provides for bail upon appeal as follows:

"(a) Right to Bail. . . . . (2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail."

An examination of this rule shows that the only statutory authority granted by the rules is that either the court, or the judge, or the justice allowing bail may at any time revoke the order admitting the defendant to bail. No authority is set forth in that statute to permit the court to revoke or set aside the order admitting the defendant to bail unless the court granted the bail. The order setting aside the bail must be done by the judge who granted bail. In this case, Judge Denman did not at any time revoke the bail granted to the defendant.

The Court purportedly acted under the authority of Rule 39 regarding "supervision of appeal." This rule sets forth as follows:

"(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with the clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail."

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An examination of this rule and the application of the rule of a ejusdem generis shows that the power vested in the appellate court was a power to give directions to the District Court, or to modify or vacate an order made by the District Court of the United States, or by any judge thereof in relation to the prosecution of the appeal, including any order fixing or denying bail. A reasonable and proper construction of this rule is to read into the last portion of the rule "or by any judge (of the District Court) as though the words of the district court were there, in relation to the prosecution of the appeal, including any order fixing or denying bail. In other words, this rule was meant to give the appellate court supervision of district court judges in relation to the appeal -- it was not to give a right of appeal to the Court of Appeals from the order of one of its own members.

The use of the word "judge" in Rule 39 is significant because the power to fix bail is given to a single judge or a single justice under Rule 46 (a)(2), and Rule 46 (a)(2) is specific that the only person who can revoke an order or vacate an order admitting the defendant to bail is the judge who allowed the order.

The construction given by the six members of the Court of Appeals would allow other judges to review the order of a single judge of the court in its own court -- and thus make justice leaden footed. (Cobbledick v. United States).

Since a justice sitting in the Circuit has no greater or different authority than any other judge within the Circuit, the absence of the word "justice" in Rule 39 would indicate that the rule was only meant to apply to supervision of judges of the District Court. Supervisory power of appellate courts is one fundamental in federal proceedings, but over

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judges of the lower court -- not over their own judges. It would be incomprehensible in the scheme of things to give that power to other judges.

We submit that the order of December 13, 1951, by the six judges of the Court of Appeals for the Ninth Circuit is void for want of jurisdiction, and that the members of that Court have the duty to set aside and vacate their own order as void and wanting in statutory authority, and that the order of Judge Denman should stand.

Chief Judge Denman, as Chief Judge of the United States Court of Appeals for the Ninth Circuit, heard the application for bail. No objections were made by either side to his hearing it as a single judge. Hearing was had upon notice and each side presented all matters that were available to it on the hearing, and they each had an opportunity to present any other matters that they thought could be material.

On November 27th, 1951, after Judge Denman had had the matter

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under submission for a period of five weeks, he made an order granting bail and fixing it in the sum of $5,000.00.

His associates under him thereafter had no right, power or authority to set down a hearing to vacate and set aside his order. Nothing new was presented. The United States Attorney first stated that Judge Denman had "arrogated" to himself a power that he did not have and "had conducted an unorthodox" procedure.

The power which the Chief Judge had "arrogated" to himself in the 'unorthodox" procedure was a power which this Court and Congress gave to the Chief Judge, and which Justices Jackson and Frankfurter specifically approved of in Stack v. Boyle, 96 L. Ed. page 7, in their concurring opinion.

In the hearing which took place on December 11th, 1951, in which the six judges sat but in which Judge Denman did not participate, the attention of the court was called to the statements appearing in Stack v. Boyle, as follows:

> "It is not appropriate for the Court as a whole to fix bail where the power has been given to individual judges and Justices to do so."

Chief Judge Mathews stated that while these were views expressed by Justices Jackson and Frankfurter, they were not the "opinion of the Court" as such and indicated that they therefore were not controlling upon the Court of Appeals.

It is therefore necessary that this Court grant a hearing to determine the right and the power of a court of appeals and the powers of Chief Judge Denman in this matter.

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In the Court's opinion, through Mr. Chief Justice Vinson, in Stack v. Boyle, 96 L. Ed. (ad. op.) 7, at page 10, Chief Justice Vinson stated:

"Relief in this type of case must be speedy if it is to be effective."

But, bail on appeal would be a mere mockery if the Chief Judge of the court granting bail and fixing it could have his order vacated and set aside by one or more of his associates or judges who do not have the position of Chief Judge, or even if they are of equal rank. The power given by the rule to a single judge to fix bail is a power to establish certain rights which must be certain and fixed and should not be subject to destruction except under specified conditions which Congress has indicated in Section 3143, Title 18, U. S. Codes, which provides only for additional bail because of a change of circumstances. Section 3143 is as follows:

"When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person perviously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge, or magistrate, setting forth the cause thereof."

This section clearly shows that there was an intent in the mind of Congress that bail once fixed should remain fixed and not be altered,

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changed or modified unless a new condition arises after the person has "been previously admitted to bail." No new condition existed or were shown to exist after the order fixed by Chief Judge Denman. As a matter of fact, the petitioner remained in jail, was unable to obtain his release to get out, although he presented a bail bond to the United States District Attorney for his approval as to form only, and the United States District Attorney refused to sign the same. Petitioner was, and has been at all times, ready, willing and able to make bond and had the bond ready and authorized by a recognized surety company ever since November 28, 1951.

Rule 46(a)(2) does not give any power to other judges to change, alter, modify, or review as an appellate court the order of its single Chief Judge. It is actually unthinkable that such a situation should or could occur, and reflects on the power which Congress has given to a Chief Judge, and in fact to any single judge to hear and determine and fix bail.

Section 45 of Title 28, U. S. Codes, provides that:

> " (a) The circuit judge senior in commission shall be the chief judge of the circuit.
>
> (b) The chief judge shall have precedence and preside at any session of the court which he attends."

It is unseemly in the administration of criminal justice that other judges could revoke and set aside and modify his orders granting and fixing bail. It would leave the question of bail and its granting highly uncertain, as occurred in the present case. There was no intent by Congress to give associates of one judge the power to review the decision of his

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associate judge or judges, resulting actually in an appeal therefrom

Here there was no showing made by the United States Attorney other than a dissatisfaction with the order of the Chief Judge. Nothing was presented which could not have been amply presented to the Chief Judge at the hearing before him. Mere dislike or dissatisfaction of a judge's order granting bail should not permit the Government to obtain a review and a reversal of that order except by an appeal to the Supreme Court. The idea that a single judge should hear and determine these matters presents an opportunity for speedy determination thereof.

In United States v. Motlow, 10 Fed. (2d) 657, at page 659, Mr. Justice Butler, speaking as a Circuit Justice, said as follows:

> "As to supersedeas and bail after sentence. It is the purpose of the law--and many statutes, federal and state, have been enacted--to safeguard litigants so far as possible against erroneous judgments. Reveiw in appellate courts is favored in all cases where the grounds on which it is claimed are assigned in good faith on advice of counsel that in law they are valid and well taken; and parties properly seeking review are not to be burdened by avoidable expense, loss, sacrifice, or punishment."

In Christoffel v. United States, 190 Fed. (2d), at 590, the court said, speaking of bond on appeal of Christoffel:

> "And in a criminal case in which a sentence of imprisonment is involved, there is a public interest against denial of consideration on appeal of substantial questions as to the lawfulness of the conviction. For if the conviction is erroneous it is abhorrent to justice that a defendant shall nevertheless suffer such

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a penalty for the crime charged."

In a hearing before Justice Jackson, after the Second Circuit Court of Appeals denied bail in the Smith Act cases, Justice Jackson granted bail pending a hearing in this Honorable Court. (95 L. Ed. 1379).

In the American Bar Association Journal of November 1951 page 844, in a review of the case of Christoffel v. United States, D.C., September 20, 1951, by Stephens, C.J., it is stated:

> "However, the Court held that having once determined that a substantial question was involved in the case, it could not properly revoke its order admitting defendant to bail or add to the conditions defined therein except upon a showing of factors which would make the defendant's appearance undependable. The Government had failed to make such a showing and its motion that defendant be denied bail or furnish a surety in addition to the deposit of $10,000 was denied."

The denial of bail to this petitioner pending appeal is a denial of a substantial right granted by Rule 46(a) (2) and should not be limited, hampered, hamstrung, stalled, or reviewed by an application to the court.

We submit that the questions are one of great importance in the administration of criminal justice, and should be determined by this Court immediately, and that the petitioner should be allowed his liberty on bail forthwith in the sum of $5,000.00, as fixed by the Chief Judge, being the same amount as was found by the Chief Judge of the Ninth Circuit as being sufficient.

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A SINGLE JUDGE HAS ALWAYS BEEN DEEMED TO BE SUFFICIENT UNDER THE RULES AND UNDER PRACTICE TO FIX BAIL PENDING APPEAL.

Ever since In the Matter of Claasen, 140 U.S. 200, 35 L. Ed. 409, it has been held that a single judge may exercise the power of fixing bail on appeal.

Justice would be rendered leaden-footed if his order was subject to review and revocation by his associates. It was never within the contemplation of the rules for Rule 46 provides that a single judge may grant bail and the same judge may revoke the bail. It does not provide for authority for other judges to revoke the bail.

FURTHER REASONS FOR LETTING THE ORDER OF JUDGE DENMAN STAND AND GRANTING A REHEARING ARE THE MANY POINTS OF MERIT ON THE APPEAL ITSELF.

The following will show the meritorious character of the appeal and presents, in part, some of the many points that we intend to urge upon the appeal itself.

The order of December 13th, 1951 was predicated partly on the fact that the entire record was not docketed and before the Circuit Court of Appeals, and the Court therefore had a limited record; and partly on the statement that Section 3616 of Title 26, U.S.C.A. did not repeal Section 1001 by implication or otherwise.

Since that time, we have re-examined the record and the record has been docketed in the Court of Appeals, and the case presents, among others, the following very substantial questions on appeal:

SECTION 3809 OF TITLE 26, PASSED AUGUST 27, 1949 BY

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81ST CONGRESS, 1ST SESSION, WAS INTENDED TO BE EXCLUSIVE IN ANY STATEMENTS MADE TO THE INTERNAL REVENUE DEPARTMENT, AND THE PUNISHMENTS THEREIN PROVIDED WERE INTENDED TO BE EXCLUSIVE WITHIN THE INTERNAL REVENUE DEPARTMENT, AND SECTION 1001 OF TITLE 18 HAD NO APPLICATION -- AND HAS NO APPLICATION.

In view of this fact:

I - Count Six of the Indictment Fails to State an Offense Against the Laws of the United States;

II - Title 18, Section 1001, inherently and as construed and applied in this case, is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States;

III - Since Exhibit 20 was introduced by reason of Count Six of the indictment but related to a statement that affected all of the counts of the indictment and was prejudicial to all of the counts in the indictment, the entire case must be reversed;

IV - The evidence is insufficient to support the verdicts. The verdicts are contrary to the law and the evidence. There is no solid basis for any net worth statement, or net worth in the evidence, in the case. The evidence is insufficient to show any solid starting point or any net worth basis for the years affected by counts one, three and five;

V - Exhibit 20, the so-called net worth statement (which was really not a net worth statement) was solicited from the defendant herein and under circumstances that amount to an entrapment -- in violation of sound public policy and the doctrine set out in

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Sorrels v. United States;

VI - The admission in evidence of Exhibit 20, as affecting all of the counts, was prejudicially erroneous by reason of the entraping nature thereof.;

VII- The Court erred in the admission in evidence of income tax statements of prior years, which were not offered to show intent and where it was not claimed that there was any falsity in the return for the prior years. The defendant's defense did not relate to such matters, and no showing of any intent was shown by the admission of the income tax returns prior to the years involved in counts 1, 3 and 5.

VIII - The Court erred in its admission in evidence of Exhibit 210(a) and testimony relating thereto.

IX - The Court erred in ints instructions to the jury -- particularly with regard to net worth and the net worth statement and with regard to the applicable law regarding one's income and expenditures during the years in question.

X - The court erred in its instructions regarding the word "willful". The instructions were confusing and misleading and contradictory.

XI - The Court was guilty of prejudicial misconduct in the trial of the case before the jury in its remarks in the very presence of the jury.

XII - The defendant was compelled to testify against himself, in violation of the Fifth Amendment to the Constitution of the United States, before the Kefauver Committee and by reason thereof was

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given immunity, which should have barred the prosecution in this case.

The foregoing are some but not all of the substantial questions which we intend to raise on this appeal.

I

SECTION 3809 of TITLE 26, PASSED AUGUST 27, 1949 BY THE 81ST CONGRESS, 1ST SESSION, WAS INTENDED TO BE EXCLUSIVE IN ANY STATEMENTS MADE TO THE INTERNAL REVENUE DEPARTMENT, AND THE PUNISHMENTS THEREIN PROVIDED WERE INTENDED TO BE EXCLUSIVE WITHIN THE INTERNAL REVENUE DEPARTMENT, AND SECTION 1001 OF TITLE 18 HAD NO APPLICATION -- AND HAS NO APPLICATION.

In 1949, Congress passed Section 3809 of Title 26. This section provided as follows:

"SEC. 3809. VERIFICATION OF RETURNS; PENALTIES OF PERJURY.

"(a) Penalties. -- Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

"(b) Signature Presumed Correct. -- The fact that an individual's name is singed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return

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statement, or other documentwas actually signed by him.

"(c) Verification in Lieu of Oath. -- The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required."

(b) Section 51(d), 145(c), and 1630 of such code are hereby repealed.

(c) The amendments made by this section shall be applicable with respect to any return, statement, or document filed after the date of the enactment of this Act."

(U.S. Code, Congressional Service, 81st Congress, First Session, 1949, page 680)."

It will thus be seen that the statement which Mr. Cohen gave to the Intelligence Officers had to be governed by Section 3809 of Title 26, which was made to apply to any statement made after the date of the enactment. Therefore this section, and NOT section 1001, governed. By the terms of this Section, section 1001 was repealed at least insofar as it affected any internal revenue matters or any statements made in that department. Furthermore, Congress has clearly said in Section 3809 when a person may be prosecuted for any statement made in connection with Internal Revenue matters. The party must both make and subscribe to the statement (paragraph a), and it must contain a written declaration or verification that it is made under the penalties of perjury. Unless the state-

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ment contains each of these element no prosecution can be had thereon.

Under the doctrine of "In clusio Unius Est Exclusion Alterius" it is clear that Congress did not intend all statement made to any intelligence agent to be prosecuted, but only those statements made to someone in the Internal Revenue Department which were both made and subscribed and which contain a verification or written declaration that it is made under the penalties of perjury.

Exhibit 20 was not made by the appellant, but only subscribed to by him. It did not contain a verification and written declaration that it "is made under the penalties of perjury." Section 1001 certainly was limited by Section 3809 which was not complied with, and therefore no public offense is charged in Count Six.

But the vice of Count Six extends to Counts One, Three and Five for Exhibit 20, introduced under the guise of count six, was used to prosecute the appellant as well under counts one, three and five, and to form the government's theory or basis for its prosecution. Therefore, it fatally infected the entire trial.

Count six is based upon Section 1001. That section was necessarily repealed by implication by Section 2809, passed August 27, 1949. Section 1001 became law, as now written, in the first revision of Title 18, in 1948. In the amendments of May 24, 1949, (c. 139, Sec. 819, 63 Stats. 92, Title 18) the title was left untouched. The amendment to the Internal Revenue Code was adopted at a later date -- August 27, 1949 -- which shows clearly that Congress intended only such statements to be referred to as "are required to be made" by the Commissioner under regulations prescribed by him with the approval of the Secretary. Subsection (c) of Section 3809

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says: "Verification in Lieu of Oath - -

> The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required."

It is therefore clear that Section 1001 of Title 18 was not meant to apply. Also, that if it does apply it could only apply to such statements as "are required by the Commissioner under regulations prescribed by him with the approval of the Secretary.

In Cook County Nat'l Bank v. United States, 107 U.S. 445, Mr. Justice Field in his opinion states, at page 451, as follows:

> "The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the legislature. And although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject. DAVIESS v FAIRBAIRN, 3 HOW. 636, UNITED

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STATES v. TYNEN, 11 Wall. 88."

In respect to a statute providing a lesser penalty for the same act or omission, the syllabus in United States v. Stafoff, 268 Fed. 417 shows:

"2. Statutes - 165 - Subsequent statute, imposing punishment for same offense, inconsistent with earlier statutes.

"Where a subsequent statute imposes a penalty for the same offense as that for which a prior statute imposed a different penalty, there is an inconsistency between the statutes, to which the rule of repeal by implication applies, especially where the punishment imposed by the latter statute if less than that imposed by the earlier."

* * *

What we have said heretofore applies to the follwing additional argument that COUNT SIX IS BASED UPON SECTION 1001 OF TITLE 18 WHICH, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, IS UNCONSTITUTIONAL IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Section 1001 of the U. S. Code, Title 18, provides as follows:

"§ 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing

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the same to contain false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both."

The section stems from old Title 18, Section 80 (1946 Edition).

The Statute, generally, is too vague, indefinite and uncertain to form the basis of a criminal prosecution. It fails to define when a matter is within the jurisdiction of any department or agency of the United States. It fails to define what constitutes the making or use of a false writing or document, and therefore comes under the ban of those cases holding that such a statute offends the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

United States v. Cohen Grocery Co., 255 U.S. 81;
Connally v. General Construction Co, 286 U.S. 385;
Lanzetta v. New Jersey, 306 U.S. 451, 83 L. Ed. 888;
Winters v. New York, 333 U. S. 507, 92 L. Ed. 840;
Musser v. Utah, 333 U. S. 95, 92 L. Ed. 562.

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In Winters v. New York, 333 U. S. 507, 92 L. Ed. 840, the

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court directly struck down for indefiniteness a statute on the books of New York which made it a misdemeanor for a person to in any way distribute any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime.

Section 1001 is even broader in its scope regarding any statement or representation made in any matter within the jurisdiction of the United States than the provisions in the Winters case, which limits its application to books, pamphlets, magazine, newspapers or printed paper devoted to crime news; and is broader than the Utah statute which makes criminal a conspiracy "to commit acts injurious to public morals." (Musser vs. Utah, 333 U.S. 95, 92 L. Ed. 562.) This Court said of the Utah statute:

> "Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." (333 U.S. 97).

The instant statute , Section 1001, standing by itself does seem to be warrant for conviction for agreement to say almost anything which a judge and jury might find at the moment was within the jurisdcition of a department or agency of the United States, or which was false representation.

It was certainly not intended that this Statute would repeal the perjury statute in matters involving governmental agencies of all the rules surrounding the requirements of proof with reference to perjury

matters. That this is so seems to be so as shown by the fact that recently in prosecutions growing out of matters before the Congressional Committees such prosecutions have been based upon the perjury statute and not upon this statute.

The present Title 18, Section 1001, stems from old Title 18, Section 80, the False Claim Statute. Originally this statute was only meant to apply to false claims made to the government with an effort to defraud the government. In 1934, the Act of 1934 (the false claims act) amended the statute to make it applicable to false and fraudulent papers in the "hot" oil cases then pending. In an opinion written by Mr. Chief Justice Hughes in that case (United States v. Gilliland, 312 U.S. 86 at 93) the statute as then written was held constitutional but implimented certain judicial constructions which placed it within the limitations under the Fifth and Sixth Amendments to the Constitution of the United States.

The Gilliland case supplemented the statute with certain requirements to make it constitutionally applicable: (1) It must be a compliment to some other statute or authorized regulation in aid of their enforcement; (2) That other statute or regulation must require the making of statements in a matter within the jurisdiction of a department or agency of the United States; (3) The duty enjoined by such statutes or regulations to make such statements must be adequately defined, and (4) There must be suitable notice of the consequences if the required statements are false or fraudulent and knowingly and willfully made.

The Gilliland case involved affidavits and reports which were required to be made, on approved forms to a federal tender board established by the Secretary of the Interior under regulations authorized by and

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for the enforcement of the Hot Oil Act.

In the instant case of Michael Cohen, it cannot be disputed that there is here involved no other statute or regulation imposing any requirement on the petitioner to make any statement to which the false claims act might be a fitting compliment. It was not contended by the Government that the statements of the petitioner here was made pursuant to any statute or regulation. The petitioner's own tax auditor, Harry Sackman, made up the statement at the request of Lloyd G. Spear, an investigator and special agent with the Internal Revenue, and Dan E. Goodykoontz, another special agent for the Internal Revenue, (R. Tr. 126, et seq., R. Tr. 1388 to 1435). This statement was Exhibit 20, a copy of which has been forwarded to this Court.

It was never contended by the Government that some statement was given to a collector or deputy collector of the Internal Revenue. Its reason for prosecuting Cohen under Section 1001 was stated in its memorandum in the Court of Appeals that "it would have been impossible to convict Cohen under Section 3616 (of the Internal Revenue Code) because the false statement was given to a special agent, not a collector or deputy collector." (R. Tr. 1389).

As stated in Jordan v. DeGeorge , 341 U.S. at 230, :

> "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct. Williams v. United States, 341 US 97, ante, 774, Screws v. United States, 325 US 91, 103, 104, 89 L Ed 1495, 1503 1504, 162 ALR 1330. This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made

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criminal before it is done are unconstitutional deprivations of due process of law. Lanzetta v. New Jersey, 306 US 451, 83 L ed 888; United States v. Cohen Grocery Co. 255 U.S. 81, 65 L ed 516, 14 ALR 1045."

Does a statement given to one's own tax auditor, which that tax auditor in turn gave to Federal Intelligence Agents making an investigation, attach a violation of Title 18, Sec. 1001? Does the act make such conduct criminal? We respectfully submit that it does not, and is an unconstitutional deprivation of due process of law of the petitioner inherently and as construed and applied.

Judged by the standards set out in the Gilliland case, there is no regulation which compliments this statute under the Internal Revenue Code. There is no statute or regulation requiring the making of the statement. There is no definition of what constitutes a matter within the jurisdiction of the department or agency of the United States. There is no duty enjoined by such statute or regulation to make such statements. There is no definition of the duty or liability of the consequences of making such statements. And, there was no suitable notice of the consequences if the required statements were false or fraudulent, or knowingly or willfully made.

M. Kraus Bros. & Co. v. United States, 327 U.S. 614, not only requires statutes to be definite and certain, but requires regulations which impliment statutes to be definite and certain.

The need for a statutory obligation to make a statement has been recognized under the authorities.

United States v. Gilliland, 312 U.S. 86;

United States v. Long, 14 Fed. Supp. 29;

United States v. Presser, 99 Fed. (2d) 819 at 822;

Hamner v. United States, 134 Fed. (2d) 592.

In United States v. Long, 14 Fed. Supp. 29, the court held that a statement made voluntarily and not pursuant to some requirement of the law was not included in the statute. Judge A. N. Hand interpreted this decision in United States v. Presser, 99 Fed. (2d) 819.

In Hamner v. United States, 134 Fed. (2d) at 592, a conviction on one count was reversed because the false statement which formed the basis of that count did not relate to anything which the pertinent regulations require to be stated. This is in accord with the familiar principles that a false sworn statement is not punishable under the perjury statute if not required to be made by pertinent law or regulation. (See United States v. Nickerson, 58 U.S. 204, 1 Sprague, 232 Fed. Cases No. 15878; Williamson v. United States, 207 U. S. 425, 108 ALR 1242.)

We have found no case in which a conviction has been upheld under the false claims act where the statement claimed to be false was not required to be made by some law or regulation, or some duty, or where some procedure was not established which imposed at least a conditional duty to make a statement because of the possible adverse consequences which might result from not making the statement. The closest approach was the case of Marzanni v. United States, No. 59, October Term, 1948, decided in 330 U.S. 545 by an equally divided court, and no opinion has been expressed on the important issue which we raise and present in this case as a substantial question.

In the United States v. Zavala , 139 Fed. (2d) 830, (C.C.

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A. 2) (1944), the false statement was contained in the customs declaration, the making of which was required by regulations which were specifically called to the attention of the accused. The only question in the case was whether or not it made any difference that an amendment made at the dock was written out by the inspector rather than the accused.

In Spivey v. United States, 109 Fed. (2d) 181 (C.C.A. 5) (1940) cert. denied 310 U.S. 631, the false statements were made in Commodity Credit Corporation Producer's cotton note given as security for loans under applicable regulations. Besides, there was much more involved in that case than mere false statement and the applicability of the statute as construed in the Gilliland case was never seriously presented or questioned. To like effect, see United States vs. Heime, 149 Fed. (2d) 485; United States v. Barra, 149 Fed. (2d) 489, (false statements in application for certificate of identification required by Presidential Proclamation and procured in accordance with detailed regulations of the Attorney General); United States v. De Lorenzo, 151 Fed. (2d) 122 (false statement in an application for federal employment, subject to certification by a Civil Service Commission, of which defendant was aware.).

In United States v. White, 69 Fed. Supp. 562, the Court held that there could be no prosecution for a statement made to a State Police Officer which concealed the fact that the defendant was transporting aliens illegally in the country.

In United States v. Crittenden, 24 Fed. Supp. 84, the Court held that a false statement in connection with the state accounting by a veteran's guardian could not be punished. (See also Terry v. United

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States, 131 Fed. (2d) 40; United States v. Sanders, 42 Fed. Supp. 436.)

From this point of view the petitioner's statement to an auditor who in turn gave it to Special Intelligence Agents were not "in a matter within the jurisdiction of the department." In this respect, the petitioner is in no different position than the accused in the case of Hamner v. United, 134 Fed. (2d) 592.

Count six of the indictment, which indictment is set forth in hace verba in the Reporter's Transcript (R. Tr. 68), alleges that

> "On or about January 3rd, 1950, in the Central Division of the Southern District of California, defendant Michael Cohen did knowingly and willfully make and cause to be made false and fraudulent statements and representations in a matter within the jurisdiction of the Treasury Department, Department of the United States, namely: in the matter of the determination of the income tax liability to the United States of said Michael Cohen and Lavon Cohen, his wife; said statements and representations appear on a document designed 'net worth statement, years 1945, 1946, 1947 and 1948 - disbursement years 1945, 1946, 1947 and 1948,' which was executed by the defendant Michael Cohen and delivered by said defendant to an officer of the treasury department;
>
> In said document the defendant Michael Cohen stated and represented that he had borrowed a total net amount of $172,500.00 during the years 1946 to 1948, inclusive, and had disbursements during the years 1946 to 1948, inclusive, in the total sum of $244,163.16, which statements and representations,

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as the defendant Michael Cohen then and there well knew, were false and fraudulent, in that said defendant had borrowed a total net amount of not more than $23,000.00 during the years 1946 to 1948, inclusive, and had disbursements in the total sum of not less than $343,139.34 during the years 1946 to 1948, inclusive."

The factual situation appears to be this:

Lloyd G. Spear, a special agent of the Internal Revenue Bureau (R. 126) in December of 1949 in company with Revenue Agent Forest Calkins, was assigned to go to Mr. and Mrs. Cohen's home to get signed waivers on the collections for 1945 and 1946 taxes (R. 127). The two tax men asked Mr. Cohen if he wanted to sign the extensions on the 1945 and 1946 returns. Mr. Cohen stated he would have to check with his tax accountant, Mr. Harry Sackman, which he did (R. 130). On January 3rd, 1950, Special Agent Spear and Goodykoontz went to the office of Mr. Harry Sackman, the accountant, in the Taft Building at Hollywood and Vine Streets, Los Angeles, (R. 131). Mr. Goodykoontz asked Mr. Sackman about the "net worth statements" which he (Mr. Goodykoontz) had asked to be prepared, and before they got into the discussion of that Mr. Cohen started talking about an occurrence that morning. (R. 132). Mr. Goodykoontz asked Mr. Sackman if the statement was prepared, and Mr. Sackman produced some file folders with a statement inside (an original and two copies) and he handed them to Mr. Goodykoontz, and Mr. Goodykoontz looked it over and started asking Mr. Cohen questions about the items that appeared therein, and particularly asked about the names of people from whom the money was set up as being borrowed,

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and Mr. Cohen made answers to him. (R. 132, 133). It was a typewritten, two page, statement (Exhibit 20) (R. 133). The statement was received in evidence, (R. 135).

The agents then started to question Mr. Cohen about the contents of the so-called net worth statement, and the persons mentioned therein.

The statement was not one required to be given, nor prepared pursuant to any rule or regulation, and thus, as construed and applied in this case, was under Title 18, Section 1001, unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States.

The second fundamental question for the consideration of the Court as a substantial fundamental question is the use of this so-called "net worth statement" in effect to establish the corpus delicti of all the counts of the indictment.

In Tax cases, as in any other cases, the fundamental rule of criminal law applies, that the corpus delicti of the crime must be proved independent of any extra judicial statements made by the accused, and by substantial evidence.

There was objection to the statement by defense counsel in the trial, (R. 135):

> "I will say that you cannot prove any case of any kind or nature upon merely admissions or whatnot -- extra judicial statements."

And, earlier, (R. 134) :

> "That is objected to in the first place on the ground that they can't show anything by extra judicial statements.

This proposition is so elemental that it hardly requires the citation of authority.

It was only because of the Exhibit 20 which the Intelligence Officer solicited from the defendant's accountant and which was executed by him that there was any foundation for the prosecution under count six at all. This was recognized by the Trial Judge at the time of argument.

Scienter was necessary element of corpus delicti (Forte v. U.S., 94 Fed (2d) 236), and the judge should have granted the motion for judgment of acquittal because the circumstntial evidence did not exclude every hypothesis but guilt. (U. S. v. Chapman, 168 Fed (2d) 1001 and U.S. v. Fenwick, 177 Fed (2d) 458.

At the time of sentence the court said, regarding the statement referred to in count six: "THE COURT: Isn't it a fact that he has virtually, by furnishing information to the government and submitting the checks he virtually talked himself into this diffitulty."(R. 2008) "If he had kept still from the beginning you would have had no case against him."(R. 2009) Thus, the alleged corpus delicti of count six was established solely by the statements of the petitioner furnished by him to his own accountant, without which there could have been no conviction. Such a statement is nothing more than uncorroborated admission and is inapplicable.

Naftzger v. United States, 200 Fed. 494;

Gulotta v. United States, 113 Fed. (2d) 683;

Pines v. United States, 123 Fed. (2d) 825;

Tabor v. United States, 152 Fed. (2d) 254;

Yost v. United States, 157 Fed. (2d) 147;

Warszewer v. United States, 312 U.S. 342, 85 L. Ed. 876.

Was the giving of such a statement such a "use", the word use as contemplated by Section 1001 Title 18 ? We respectfully submit that

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it was not.

See: Browder v. United States, 312 U.S. 335, 85 L. Ed. 862; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 186, 76 L. ed. 1038.

If then Count Six never stated an offense against the laws of the United States because of the vagueness and indefiniteness and uncertainty of the statute, inherently or as construed and applied in this case, and because of the indefiniteness of the words "within the jurisdiction" and the definition of the word "use" in connection with the statute; and if the evidence therefor received should not properly have gone before the jury, the effect of presenting Exhibit 20 to the jury was to fatally infect the entire trial.

(3) Another fundamental question raised by this appeal and the errors thereby committed was that the statement was not truly a "net worth statement" although labelled as such.

Exhibit 20 was erroneously labelled a "Net Worth Statement". It referred to the income and the loans of the petitioner for the years 1946, 1947 and 1948, - all of the years in question involved in the other three counts of which petitioner was convicted.

In a net worth case, the starting point must be based upon a solid foundation. A revenue agent's statement of the defendant's admissions or confessions or a statement of his auditor merely executed by him certainly is not sufficient to form the starting point. The statement did not actually establish appellant's net worth. It only showed monies received and loans he made, and therefore could not furnish the starting point for the government's case.

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In Bryan v. United States, 175 Fed. (2d) 223, the court quoted the auditor as follows:

> "A net worth basis is simply an increase in net worth from one year to the next year. By net worth from all capital items and expenditures that we recorded here we show where the increase in net worth came from. That is where that net worth and expenditure basis comes into the picture. Establishing a net worth at the opening of the period and establishing a net worth at the close of the period, and the increase in net worth is the figure we have in the audit after each year under investigation. (275 Fed. (2d) 223 at 225, footnote.)

The court also quoted United States v. Chapman, 168 Fed. (2d) 997, 1001, and United States v. Skidmore, 123 Fed. (2d) 604.

In that footnote, the court quotes Judge Arundell of the Tax Court, as follows:

> "But there is another reason of equal importance that throws discredit on respondent's method and that is his failure to determine with any degree of accuracy petitioner's net worth at the starting date of December 31, 1941. It would be absolutely necessary to know the amount of petitioner's net worth at the beginning of the taxable period before one could determine under a net worth basis a taxpayer's income for succeeding years."

It will thus be seen that Exhibit 20, which was merely a statement of cash and loans was treated in the trial court, as the net worth basis and starting point upon which the government relied; and it will readily be seen how this statement, flaunted before the jury,

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not merely as to Count Six, was so judicial as to all the other counts for it was introduced into evidence not merely as to Count Six but was received and considered by the jury as to the entire case. Since, under our contention, it was improperly before the jury even under count six and it was not limited to that count, but was used in the entire case, it so fatally infected the trial that all the judgments must be reversed.

Bryan v. United States, 175 Fed. (2d) 223;

Fenwick v. United States, 177 Fed. (2d) 488;

Brodella v. United States, 184 Fed. (2d) 823.

In his charge to the jury the court did not at any time define what constitutes a "net worth statement" within the meaning of the law, as set out in Bryan v. United States, 175 Fed. (2d) 223 and Fenwick v. United States, 177 Fed. (2d) 488, and in other cases. It assumed that Exhibit 20 was in fact a Net Worth Statement and left no question to the jury to determine whether it was in fact a net worth statement.

Since this was one of the essential elements of the crime itself, it was necessary for the court to define what constitutes the net worth statement and leave it to the jury to determine, if it was admissible at all, whether this was a net worth statement. The assumption by the court is contained repeatedly in its instructions, Reporter's Transcript pages 1946, 1947 and 1948. It can well be seen, then, how the jury was misled into believing that this was the net worth of the appellant in the years 1946, 1947 and 1948, to which his evasion counts related, even though not defined by the Court as required by Screws v. United States, 325 U. S. 91.

The court also, in its instructions, told the jury that "You are

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instructed that as a matter of law the Treasury Department is an agency of the United States and the statements and representations in the net worth statement were made in a matter within the jurisdiction of that Department," (R. Tr. 1947) although the question was one of fact in view of the fact that the statment was made to an auditor, and merely executed by the defendant, and the auditor gave it to special agents of the Intelligence Division looking into his tax matter, at their request. Was this 'making a statement and representation in a matter within the jurisdiction of that department? We respectfully submit that it was not and that the instruction was erroneous.

Furthermore the court instructed the jury:

> "Under the expenditure method of establishing income, evidence of the expenditure of money in a given year in excess of the amount reported as income may be considered by the jury as part of a chain of circumstances in arriving at a conclusion as to whether or not the defendant has unreported income; that is, if the defendant's expenditures for the years of 1946, 1947 and 1948 exceeded the defendant's available declared resources. You may find that such expenditures were attributable to taxable income." (R. Tr. 1941, lines 12 to 20).

Under the facts and circumstances of this case, that instruction was confusing and erroneous. It necessarily had to be coupled with Exhibit 20, the defendant's own purported net worth statement, which at no time report "the defendant's available declared resources" - whatever that statement means.

If that statement means Exhibit 20, then it is inadequate since

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Exhibit 20 does not make a declaration of "the defendant's available declared resources" but only of cash on hand and sources of loans. Furthermore, defendant's available declared resources has no definition at all in the instructions of the court, and establishes a new basis of tax liability not heretofore set out in any of the procedures such as the bank deposit method or the net worth method. If we read the instruction correctly, it means that regardless of how much money or assets a person had, if he spends more money in a given year in excess of the amount that he reported as income for that year, the jury may consider such proof of spending more than his income for the years, whether or not the defendant had unreported income, and upon that basis that such expenditures were attributable to taxable income.

There is nothing in the Internal Revenue Code that makes one guilty of income tax evasion because he spends more money in a given year than the amount of money he reported as income for that year, nor does it shift the burden of proof upon him to establish his resources, nor can the government take merely the accused's own available declared resources as the starting point. This is not the net worth method of computation, which has been worked out by the government and set out in Bryan v. United States, 175 Fed. (2d) 223.

As the instruction went to the very heart of the case which was tried on the expenditure method and the instruction was erroneous, it effected each of the counts involving the years 1946, 1947 and 1948. Screws v. United States, 325 U.S. 91

In presenting our argument here, we do not think we are required to establish the substantial grounds for appeal that would require a reversal, but only that we have substantial grounds which are fairly

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debateable and which are yet left for the Court of Appeals to pass upon.

SECTION 1001 of TITLE 18, IS NOT APPLICABLE TO THE INTERNAL REVENUE CODE OR THE DEPARTMENT. TITLE 26 SETS UP A COMPLETE SYSTEM OF GOVERNMENT FOR HANDLING INTERNAL REVENUE MATTERS, INCLUDING PROSECUTIONS THEREUNDER, AND PROSECUTIONS WERE MEANT TO BE LIMITED TO THE SCOPE AND SPHERE WITHIN TITLE 26.

When Congress set up a complete Internal Revenue Code regarding taxes and prosecutions for violations thereunder, we think it meant to be exclusive, and to provide the punishments that were intended for violations of the Internal Revenue Code within the code itself so that a tax payer may look to that Code and know what law he is violating or if he is violating any law, or to Regulations which may implement the code.

In the first presentation of this matter, it was argued that Section 3616 of the Internal Revenue Code repealed old Section 80 of Title 18 (the false claims statute). In the later presentation of the matter, it was argued that the Internal Revenue Act is complete within itself and exclusive and provides the manner or means of punishing those who violated the sections of the Internal Revenue Code, and that Section 1001 of Title 18, the revision of old Title 80 was not meant to apply.

It is a general rule of statutory construction that where there is a general statute covering subject matter but also a specific statute covering the entire field that the specific statute will control.

In Varney v. City of Albuquerque, New Mexico, 55 Pac.(2d) 40, it is said:

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"A statute enacted for the primary purpose of dealing with a particular subject, prescribing terms and conditions covering the subject matter supersedes the general Statute which does not refer to that subject, although broad enough to cover it. This rule of construction is so well established that we content ourselves with citing a few of the cases at hand. (citing Gardner v. School Dist., 34 Okla. 716, 126 Pac. 1018; Ulster County v. State, 177 N.Y. 189, 69 N.E. 370; People ex rel Fore v. Mo. Pac. Ry. Co., 342 Ill. 226, 173 N.E. 816; Daniels v. State, 150 Ind. 348, 50 N.E. 74; City of Marshall v. State Bank of Marshall, 60 Tex. Civ. App. 508, 127 S.W. 1083; Thomas v. Evans, 73 Ohio St. 140, 76 N.E. 862; Gilkison v. Mo. Pac. Ry. Co., 222 Mo. 173, 121 S. W. 138, 24 L.R.A. (new series) 844, 17 Ann. Cas. 763; Townsend v. Little et al, 109 U.S. 504, 27 L. Ed. 1012; Car. -Tenn. Power Co. vs. Hiawasee River Power Co., 171 No. Car. 248, 88 S.E. 349."

Many other cases could be cited: United States v. One Chevrolet Coupe, 9 Fed. Supp. 85.

In Cook County National Bank v. United States, 107 U.S. 445, 27 L. Ed. 537, it is said:

> "A law embrrcing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed."

And, even though Congress passes an all embracing general law, without reference to the particular subject matter, such law revises an earlier law that was in existence at the time, and puts it in a new code, as was

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done with Section 1001 of Title 18, which was the Revision and extension of old Section 80, we think that this general principle of law would, under statutory construction, still be applicable; namely, that when Congress passed the Internal Revenue Code with all of its various sanctions for violations of the code, that it was meant to be all embracing and would not be changed or effected by a general law which had no reference to the Internal Revenue Code.

We respectfully submit that this is a substantial question to be passed upon on this appeal, for if Count Six was improperly before the court and jury then the devastating effect of Exhibit 20 (the so-called net worth statement) would have been out of the case and its prejudicial effect would have been eliminated. In any event, as to Count Six of the indictment, there is a substantial question.

Rule 46(a)(2) reads as follows:

"(a) Right to Bail.

(2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. . . "

As read by us, it says one substantial question. As read by the government, they would say that the case requires four substantial questions because the case involves four counts instead of one count on which there was a conviction had. We do not so read the rule as the plain language of the rule does not say that the case must involve four substantial questions but "a substantial question."

In any event, each of the counts raises substantial questions on this appeal.

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COUNT SIX OF THE INDICTMENT DOES NOT STATE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

Count Six of the indictment alleges that the "defendant Michael Cohen, on January 3rd, 1950, knowingly and willfully made and caused to be made false and fraudulent statements and representations in a matter within the jurisdiction of the Treasury Department, which statements and representations are contained in the document designated "Net Worth Statement, Years 1945 - 1946 - 1947 - 1948 - Disbursement Years 1945 - 1946 - 1947 - 1948," and executed this document and delivered it to an officer of the Treasury Department.

Section 1001 of Title 18 was not intended to apply to Revenue matters or to repeal the sections of the Revenue Code regarding penalties and sanctions. We have heretofore pointed out that Section 1001, Title 18, U.S. Code, stems from Section 80, Title 18, as it existed in the old Title 18 Code prior to the general criminal code revision. This section was not meant to repeal or supplement the Internal Revenue Code, Title 26, which in Section 145 of Title 26 provides as follows:

"§ 145. Penalties

(a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information,

at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to Collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code." (paragraphs (d) and (e) omitted).

To implement Section 145, Congress has also provided Section 3616 of Title 26, as follows, and has provided Section 3632, as follows, and Section 3633, as follows:

"§ 3616. Penalties Whenever any person --

(a) False returns. Delivers or discloses to the collector or

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deputy any false or fraudulent list, return, account, or statement with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or,

(b) Neglect to obey summons. Being duly summoned to appear to testify, or to appear and produce books as required under section 3615, neglects to appear or to do produce said books--

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(c) Cross reference

For additions to tax in case of fraud or of failure to file return see section 3612 (d)."

*

"§ 3632. Authority to administer oaths, take testimony, and certify (a) Internal revenue personnel

(1) Persons in charge of administration of internal revenue laws generally. Every collector, deputy collector, internal revenue agent, and internal revenue officer assigned to duty under an internal revenue agent, is authorized to administer oaths and to take evidence touching any part of the administration of the internal revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken.

(2) Persons in charge of exports and drawbacks. Every collector of internal revenue and every superintendent of exports and drawbacks is authorized to administer such oaths and to certify

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to such papers as may be necessary under any regulation prescribed under the authority of the internal revenue laws.

(b) Others. Any oath or affirmation required or authorized by any internal revenue law or by any regulations made under authority thereof may be administered by any person authorized to administer oaths for general purposes by the law of the United States or of any State, Territory, or possession of the United States, or of the District of Columbis, wherein such oath or affirmation is administered, or by any consular officer of the United States. This subsection shall not be construed as an exclusive enumeration of the persons who may administer such oaths or affirmations. 53 Stat. 441."

*

"§ 3633. Jurisdiction of district courts

(a) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(b) To issue orders, processes, and judgments

For authority of district courts to issue orders, processes, and judgments for enforcement of internal revenue laws, see section 3799."

An examination of these Sections shows that Congress in Section 3616 provided for a penalty only for failure to deliver or disclose to

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the collector or deputy any "false or fraudulent list, return, account, or statement with intent to defeat or evade the valuation, enumeration or assessment intended to be made." It did not include within its scope every Internal Revenue Agent or Special Intelligence Agent.

Section 3632 gave authority, and gives authority, to such internal revenue agents to investigate matters, and such agent "is authto administer oaths and to take evidence touching any part of the administration of the internal revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken."

Under Section 145 (c) one who makes a false oath in connection with these matters is liable to prosecution for perjury.

Hart v. United States, 131 Fed. (2d) 59

And, one who makes a false oath is thus liable to prosecution for perjury if the matter is material; if it is in a matter authorized by law to be investigated and gives the witness full protection of the laws relating to perjury.

The application, in this case, of Section 1001 has in effect impliedly repealed not only Section 3616, which limits its scope to collectors and deputy collectors, but Section 3632 as to the Congressional intent of the manner and means of gathering information and prosecuting violators under the Internal Revenue Code.

We submit that there is nothing that shows that Congress ever intended by Section 1001 to extend its scope to impliedly repeal or set aside the requirements and safeguards afforded to the Internal Revenue Code for investigation and prosecution. The application of Section 1001

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Title 18, as construed and applied in this case, would so extend the scope of intelligence agents in the Internal Revenue Department beyond Congressional intent as in effect to be a repeal of those sanctions in Title 26 and the authority granted by Congress. We do not think that this scope is warranted by the Statute. Then Count Six of the Indictment fails to state an offense against the laws of the United States. It fatally effected the whole case because of the use of Exhibits, and particularly Exhibit 20, in connection with Count Six which applied to the other counts in the case.

That Congress did not intend to extend the application of Section 1001 to matters in the Internal Revenue Code is further shown by the fact that Congress itself did not amend the Internal Revenue Code to make Section 1001 of Title 18 applicable to the provisions of Section 3616, Title 26; Section 3632, Title 26 and Section 145 (a), (b), and (c), Title 26, but left the sanctions and cross references referred to in those sections as mentioned. The need for any oaths or the right to prosecute for perjury becomes meaningless if Section 1001 has the application as given to it by the Government in this case.

Old Title 80, the predecessor of Section 1001 of Title 18 was in existence at the time the Internal Revenue Code and all its penalties and sanctions was adopted. Although it did not have quite as expansive language as at present, it was Section 35 of the Criminal Code, of which Section 80 (a) forms a part. It originated as the act of March 2nd, 1863 (12 Stat. 696) and later became Section 5438 of the Revised Statutes under the codification of December 1st, 1873, approved June 22nd, 1874. Up to that time it carried a single penalty as to all offenses "of not less

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than one nor more than five Years" at hard labor "or" a fine of "not less than $1,000 nor more than $5,000." An amendment of May 30, 1908 (35 Stat. 555), along with other minor changes, separated the offenses, and provided as to some penalties of "not more than five years" imprisonment (at hard larbor), "or" a fine of "not more than $5,000" with no minimum. The Act of March 4, 1909 (35 Stat. 1088) entitled an "Act to Codify, Revise, and Amend the Penal Laws of the United States," declared that "they are hereby codified, revised, and amended, with title, chapters, headings, and sections, entitled and numbered and to read as follows": "Chapter Four" was headed "Offense Against the Operations of the Government", and, beginning with Section 27 running through Section 84, the subject matter of each section was listed with a short description, and former Section 5438 of the Revised Statutes, the one involved here, receiving the number "35, Making or presenting false claims." The only changes made in this section were to add the words "or both" (imprisonment or fine) at the end of the first clause which provided greater penalties, the substitution of a period for the semicolon formerly used, and the transposition of the provisions for fine in each instance to precede the terms of imprisonment, but the conjunction "and" was retained between the fine and imprisonment of the lesser class of offenses.

Unsuccessful attempts having been made under Section 35 to punish persons committing frauds against some of the corporations created by Congress during the World War I, in which the Government owned all or a part of the stock (Sallas v. U.S., 234 Fed. 842; U. S. v. Bowman, 260 U.S. 92) Congress passed the amendment of October

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23, 1918 (40 Stat. 1015), which makes this Section applicable to "any corporation in which the United States of America is a stockholder." The Act of April 4, 1938, merely divided Section 35 into Subsections (A), (B), and (C), and separated them into paragraphs.

Up to this point, it cannot be doubted that the purpose of Section 35 of the Criminal Code was to reach "offenses against the operations of the Government", by punishing those making or presenting false claims against it. . . .

On June 18, 1934 (48 Stat. 996), the section was amended as follows:

"SEC. 35. (a) Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of

the United States or of any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to such person having authority to receive the same any amount of such money or other property less than for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

When the Title 18, Crimes and Criminal Procedure, was revised Section 1001 was rewritten under Chapter 47, called "Fraud and

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False Statements", and is headed "1001. Statements or entries generally". The section is as follows:

"§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(80th Congress - 2d Session, Act June 25, 1948, C. 645, 62 Stat. -- (H. R. 3190).

Considering the entire history of Section 1001 and the rules of strict construction which must be applied to criminal statutes, whereas the Section 1001 shall be confined to such statements and act when committed in connection with the operations of the government itself, as such, and not to extend the scope far beyond Congressional intent.

Under the well known doctrine of the ejusdem generis, general or omnibus clauses, such as, "in any matters within the jurisdiction of any department or agency" would mean matters of a similar or kindred nature to those dealt with in the explicit provisions of the law, in this instance such as claims against, rights to, or controversies about funds or properties are matters within the jurisdiction of a department and in connection of the operations of the government."

The case of Marzani v. United States, 168 Fed. (2d) 133; cert. den. 334/ U.S. aff. 336 U. S. 922, in which the Supreme Court

of the United States split four to four, involved a statement within a department of the government and within the government, as such.

To hold with the Government in this case under its present contention would be to say that "Congress intended to create a multitude of crimes with respect to the operations of innumerable and ever-growing investigations and tax matters, and in connection with the ever-growing departments, bureaus, and agencies of the Government, Congressional Committees, and others by the simple means of amending in general terms the statute, which has always been understood to apply to matters in which the government was financially interested, or in which the government itself was involved within its own departments." It would also mean that the Congress virtually intended to abolish the Perjury Section in relation to all such matters, and would end the need to any oath, as required by Section 3632 of Title 26 in connection with any Internal Revenue matters.

In United States v. Kitell, 211 U. S. 370, the Supreme Court had under consideration an indictment consisting of two counts, the first of which charged a conspiracy to illegally obtain title to coal lands belonging to the United States, in violation of Section 5440 of the Revised Statutes; and a second count charging a conspiracy to violate Section 4746 by "making and presenting and causing to be made and presented, in connection with the entries of coal land, certain false, forged, and fictitious affidavits and papers." The court called attention to the fact that the last mentioned section had been one bearing the title of "Pensions" and that the amendment of July 7, 1898, had added thereto a clause that "anyone who made or assisted in making false affidavits, etc., concerning any claim for pension * * * or pertaining to any other matter within the juris-

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diction of the Commissioner of Pensions or the Secretary of the Interior" should be punished as provided therein. As stated, the second count of the indictment was laid under this section 4746 as thus amended and charged the making of false and fictitious papers, in connection with coal lands of the Government, which were under the jurisdiction of the Secretary of Interior. The lower court had quashed both counts of the indictment, the first of which has no bearing upon the present case, and in disposing of the appeal of the Government with respect to the second count, the court, through Justice White, later Chief Justice, at page 395, had this to say:

"It was conceded by the United States in argument, and indeed it could not have been in reason denied, that the section in question, as originally embodied under the head of pensions in the Revised Statutes, related exclusively to pension or bounty claims. No crime, therefore, could have been predicated under the original section upon the affidavits or other papers used in making the coal land entries as alleged in the indictment. The contention, therefore, as now made by the United States, to sustain the second count, rests upon the proposition that the amendment to #4746 by the act of July 7, 1898, had the effect of bringing within that section subjects to which, prior to the amendment, the section in no manner related. Turning to the text, which we have previously quoted, with the provisions incorporated by the amending act, printed therein in italics, it will be observed that every enumeration or description of new acts or papers, in addition to those embraced in the section prior to the amendment, alone concern pension or bounty land claims. The

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argument as to the broad scope of the statute in its present form rests therefore alone upon the proposition that because the amendatory statute in repeating the original words, viz, 'concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions,' adds to them the following, viz, 'or of the Secretary of the Interior,' therefore the statute now embraces not only acts done in connection with pension or bounty land claims but all acts of prohibited character as to any matter coming before the Secretary of Interior, or subject to so come, entirely without reference to whether they were in pension or bounty land claims or proceedings. But to adopt this latitudinarian construction would cause the statute to create a multitude of new and substantive crimes, wholly disconnected with claims for pension or bounty land, with which latter it was alone evidently the purpose of the original as well as the amendatory statute to deal. We think to state the proposition is in effect to answer it. When the original text and the amendments which were made are taken into view, the conclusion inevitably follows that the purpose of the amendment was but to more specifically define the pension or bounty land papers, etc., with which the statute was concerned, and to enlarge the operation of the statute in respect to such papers so as to cause it to be criminal to use the pension or bounty land papers, etc., to which the statute refers, as well before the Secretary of the Interior as before the Commissioner of Pensions. In other words, that the only purpose of the amendment was to more fully deal with the

subjects with which the provision which was amended dealt, and not by way of the amendment to legislate concerning every conceivable subject coming within the jurisdiction of the Secretary of Interior To otherwise hold would not only violate the most elementary rules of construction, but would require the treating as superfluous the new words of enumeration concerning pension matters which the amendatory act expressed. This follows because of the adding by way of amendment of the words 'or of the Secretary of the Interior' contemplated bringing within the criminal inhibitions of the statute every act of a like nature to those forbidden done in connection with every subject within the jurisdiction of the Secretary of the Interior, then the new enumerations made in the amendment were wholly unnecessary, because without enumeration they would have been embraced in the statute as amended. Indeed, if the purpose intended to be accomplished by the amendment had been to embrace all acts of the prohibited nature as to every subject within the jurisdiction of the Secretary of the Interior, no reason can be suggested why the new legislation should have taken the form of a mere amendment to the section of the statutes which was alone concerned with pension and bounty land claims. Construing the statute as relating only to the subject of pension and bounty land claims coming within the authority of the Commissioner of Pensions of the Secretary of the Interior it follows that a violation of its provisions could not arise from the acts charged in the indictment concerning the coal land entries."

See also U. S. vs. Salen, 235 U. S. 237.

The act, as set out in United States v. Gilli-

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land, 312 U. S. 86, 92, 93, shows that Congress had no intent to extend the Statute to form an omnibus statute for the prosecution of all matters.

> "The law was intended to apply only to presentation of affidavits and reports required by the subsequent Act of February 22, 1935. (312 U. S. 95) and the regulations duly prescribed thereunder."
>
> The statute was meant to be observed "in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required." (Italics ours).

We repeat, Count Six therefore does not state any offense against the laws of the united States, and that Title 1001 has no application, and that in view of this fact that the admission of evidence under it was highly infectious and prejudicially erroneous in the entire case.

CONGRESSIONAL INTENT WAS TO GIVE NOTICE AND HEARING UNDER SUMMONS AND TESTIMONY TAKEN UNDER OATH IN INTERNAL REVENUE MATTERS. SECTION 1001 WAS NOT INTENDED TO ELIMINATE SUCH PROCEDURE.

It is apparent from an examination of the Internal Revenue Code that Congress set up a system for issuing summons, swearing a witness and taking his testimony under oath. Due process of law guaranteed by the Fifth Amendment to the Constitution of the United States would require no less.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158

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The procedure set up by Congress in Section 3632 of Title 26 and 3616 of Title 26 is set out herein (page 22, and 23). The statement procured (Exhibit 20) was not procured nor were the questions which followed in conformity with applicable provisions of Section 3632 of Title 26, nor upon any notice and demand of the collector that there was any tax due, nor was the petitioner represented by counsel or given any advice as to either his constitutional or statutory rights. The whole procedure was not in conformity with procedure which Congress has set up in the Internal Revenue Code. These procedures require the person to be served with summons, thus being given notice of any hearing and an opportunity to be advised by counsel and notice of the nature of the proceedings; and require the giving of an oath and surround the testimony with all safeguards surrounding testimony in cases of perjury - which require that the matters inquired into be material and relevant and within the scope of notice, and that any testimony thus given is required to be corroborated under the rules governing perjury prosecutions.

It is clear that Congress never intended Section 1001 to be put to the uses which it has been put to in this case. In the case of United States v. Gilliland, 312 U. S. 86, 91, Chief Justice Hughes pointed out that "any one presenting the required affidavits and reports to the Board set up under pertinent regulations was suitably charged with notice of the consequences of knowingly and willfully including therein any false and fraudulent statements." (Italics ours)

The limitations thus applied in the Gilliland case conform to the rulings of this court in a long line of cases that no one may be required at the price of life, liberty or property to submit to private interrogations

without pertinent statutes or regulations and without being charged with notice of the consequences and without having an opportunity to be represented by counsel.

We think that Title 26 contains the required procedure by summons and notice and by taking testimony under oath, subjecting the person to prosecution as for perjury, and that Congress never intended these procedures to be in effect repealed or replaced by Section 1001, Title 18.

The rule of "Inclusio Unius Est Exclusio Alterius" seems to be applicable here -- that Congress having included in Title 26, in Section 3616, that prosecution shall result in statements to the collector or deputy collector that may be false, excluded statements made to Special Agents of the Intelligence Division of the Internal Revenue and other persons; and the inclusion of Section 3632 as to the mode and manner of conducting hearings showed a Congressional intent to exclude other means of prosecution, and that the entire manner of handling internal revenue code cases is set up in subsections (a) and (b) of Section 145, Title 26.

(NOTE: It appears that Section (c) of Section 145 was repealed by public law 271, 81st Congress, First Session, which adopted in its place Section 3809 of Title 26, as follows):

"SEC. 3809. VERIFICATION OF RETURNS; PENALTIES OF PERJURY.

"(a) Penalties. -- Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and

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correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

"(b) Signature Presumed Correct.-- The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

"(c) Verification in Lieu of Oath.-- The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required."

(b) Section 51 (d), 145 (c), and 1630 of such code are hereby repealed.

(c) The amendments made by this section shall be applicable with respect to any return, statement, or document filed after the date of the enactment of this Act."

(U. S. Code, Congressional Service, 81st Congress, First Session, 1949, page 680).

It thus appears that Section 3809 is a special statute and specific statute which sofar as the Internal Revenue Bureau is concerned is a limitation on Section 1001; and, since Section 3809 became law on a later date, it is controlling and binding under authorities we have cited herein that "specific legislation on a subject matter is controlling."

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Under Section 3809, the statute requires that "any person who willfully makes and subscribed any return, statmment, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony." The verification is in lieu of an oath, but Section 3809 provides that it is made only "under the penalties of perjury." Hence, it is evident that the Internal Revenue Code is complete and exclusive and that the so-called net worth statement could not properly be prosecuted under Title 1001, and that Congress only intended prosecutions for false returns, statements, or other documents to be made.

The amendment which carried a statement that the Bill was to provide "certain administrative amendments designed to facilitate and improve the operations of the Bureau of Internal Revenue, and have the approval of the Treasury Department and staff of the Joint Committee on Internal Revenue Taxation" became law August 27, 1949.

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THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICTS AS TO EACH OF THE COUNTS ON WHICH CONVICTION WAS HAD.

The Government in this case had the burden of proof beyond a reasonable doubt. It was encumbent upon them to prove as to counts one, three and five covering the taxable returns filed in 1947, 1948 and 1949, a willful and knowing attempt to defeat and evade a large part of the income tax due and owing to the United States for the calendar years preceeding it by filing and causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax return, in the amounts there specified in the indictment. (R. 64, 66, R. 67). As to each of these counts, the burden of proof was upon the government to show net income in excess of the gross income of the petitioner.

We respectfully submit that the government failed to meet this burden of proof. Their reliance was upon a so-called expenditure method, and solely upon a so-called "net worth statement" procured from the defendant's auditor at the request of the internal revenue agents, (Exhibit 20). But there had to be a fair starting point, to-wit, it was the burden of the government to establish a net worth basis itself, and this net worth basis had to be established from all applicable income of the petitioner and not merely cash on hand or loans made.

In Bryan v. United States, 175 Fed. (2d) 223, the conviction was reversed because of net worth statement inadequacy. The court, at page 225, said:

"In the absence of an admitted or definite statement that bound or tended to bind the Defendant as to his net worth on January

1, 1941, the auditor for the Bureau undertook to compute such net worth from (taxpayer's records and such) information as he could find and which he considered reliable."

The auditors in this case admitted that they did not know whether defendant had other monies. And, in United States v. Fenwick (C.C.A.7), 177 Fed. (2d) 488, the government agent himself examined records and prepared the net worth statement. The conviction was reversed again because the statements did not, at the beginning of the period, necessarily include all of the defendant's assets nor show a full true net worth. The court's opinion said, at page 490:

"The weakness of the government's position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant's net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. Bryan v. United States, 5 Cir., 175 F. 2d 223; United States v. Chapman, 7 Cir., 168 F. 2d 997, 1001; United States v. Skidmore, 7 Cir., 123 F. 2d 604, 608."

The statement relied on by the government in this case is not a true net worth statement, but only includes cash and loans, and this certainly was an inadequate basis upon which the government could rely for its conviction in this case; and, it was misleading to the jury because it was labelled a "Net Worth Statement" although in truth and in fact it was not a net worth statement.

Usually net worth statements are made by Government Agents

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not by an accused or his tax accountant. Here none were made by any government agents.

As to each of these counts, also, the burden of proof was on the government to show "knowing and willful filing of a false and fraudulent income tax return." It appears from the records of this case that the returns were prepared by a tax accountant who had been a tax accountant for many years; that the defendant had hired him to do this mathematical work since he, the defendant, 37 years old, only went to the third grade in school. (R. 1693) He sold newspapers on the street to make a living and became a prize fighter (R. 1694) and up to three and one-half years before the trial was a gambler, (R. 1695), and since 1947 was in the haberdashery business, (R. 1695, 1696), and managed some prize fighters, (R. 1696, 1697), and engaged as a betting commissioner on horse races, (R. 1698) and would book horses, (R. 1699). and parcel out bets in various ways. (R. 1700, 1701). He reported these matters to his accountant (R. 1712), Harry Sackman.

The statement was prepared by Harry Sackman (R. 1760-1763) and the defendant followed his advice regarding his audits and his accounts. The defendant reported his matters to his tax advisor. (R. 1783)

" Q Are you familiar at all with books, records, or tax matters -- making out income tax returns?

A No, I am not.

Q What is that?

A I am not, no.

As to Count Six, we have already pointed out why the evidence

is insufficient to sustain the judgments. There was no evidence that the defendant made the statement, and the indictment did not allege that he made the statement, but merely that he executed the same. It was requested for by the Intelligence agents through his tax accountant. It is not such a use as was intended and forbidden by Title 18, Section 1001, U. S. Code. The definition of the word "use" has been the subject of this court's consideration in Browder v. United States, 312 U.S. 335 85 L. Ed. 862; Utah Power & Light Co. vs. Pfost, 286U.S.165, 186, 76 L. Ed. 1038.

The word "use" in connection with Title 18, Section 1001, is limited to uses of matters within the jurisdiction of the particular agency as therein defined by the agency - not any use necessarily. The evidence in this connection falls far short of being sufficient. There is no evidence of any specific intent on the part of the appellant and petitioner to either make or use this statement. As we have seen, Agent Lloyd Spear and Agent Dan E. Goodykoontz solicited the auditor to have the statement prepared. The petitioner signed it at the solicitation of the tax consultant. There is absolutely no evidence of any specific intent to use the statement in violation of any law, or that there was a "knowing or willful" use thereof, as those words are defined.

THE EVIDENCE SECURED WAS CLEARLY THE RESULT OF AN ENTRAPMENT.

Agent Spear, according to his own admissions, asked Mr. Sackman to get up a "net worth statement". Mr. Spear testified that when they got to Mr. Sackman's office, Mr. Goodykoontz asked Mr. Sackman about the net worth statement, which he had asked to be prepared. (R.

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132). Mr. Goodykoontz asked Mr. Sackman if the statement was prepared, and Mr. Sackman produced some file folders with a statement inside (an original and two copies) and he handed one to Mr. Goody-Koontz, and Mr. Goodykoontz looked it over and started asking Mr. Cohen questions about the items that appeared thereon. (R. 132). He particularly asked Mr. Cohen about the names of people from whom the money was set up as being borrowed, and Mr. Cohen made answers to him. (R. 133). Mr. Sears made a memorandum of the interview after the interview was over. (R. 133).

Mr. Cohen was then without counsel and was not advised in any way that the agents were soliciting this statement for the purpose of prosecuting him, as the basis of it. The solicitation and the use thereof was an entrapment. It was the clear intent of the agents at the time to secure it for the purpose of prosecuting the petitioner.

A conviction based thereon is contrary to public policy.

Sorrells v. United States, 287 U. S. 435.

There the court points out that it is contrary to public policy to solicit a man to commit an act which might be criminal and then prosecute him for it. (And, see Rochin v. U.S., decided Jan. 2, 1952).

We think the doctrine cited in Sorrells v. United States is applicable here, where the defendant without advice of counsel or without notice that the agents were soliciting the statement to use it for the purpose of prosecuting the defendant on the statement itself did the same.

And, again, we submit that if this fatally infects Count Six, it affects all of the counts of the indictment, since the trial, the prosecution and conviction necessarily rested on the substantiality of the so-

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called "Net Worth Statement" (Exhibit 20) introduced under count six as the res gestae of that count, but still applying to all the counts before the jury.

ERRORS IN THE ADMISSION OF EVIDENCE IN THE CASE

THE COURT ERRED IN THE ADMISSION OF EVIDENCE IN THE CASE OF INCOME TAX RETURNS PRIOR TO THE YEAR 1946.

It was not contended by the Government that in any of the prior years, the defendant had falsified his returns, or that these were so-called similar transactions. They were merely introduced by the Government for the purported purpose of showing lack of sizeable income during the particular years in question. It could not be introduced for this purpose, and it was prejudicial error to the whole case to permit such introduction.

Over objections of counsel, the Court admitted the prior returns prior to the years 1945, particularly the years 143 and 1944. The returns of the prior years were admitted in evidence on the basis of Rose v. United States, 128 Fed. (2d) 622 (R. 89) for the purpose of continuance of the income and conduct involved in the indictment years, and it bears on the question of motive and intent.

It is not contended that the prior years were false or incorrect, or that they proved any motive or intent; and in those cases where prior years were allowed, it bore on the question of fraudulent intent, whereas in the instant case there is no contention that the prior years had any bearing on the fraudulent intent, In the instant case, the petitioner's position was that he had borrowed large sums of monies and was engaged in the commission business, betting and bookmaking, and received large

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sums of money. Hence, the question of intent and motive, which was raised at the very beginning of the case, and with the first witness (R. 80) was not properly before the court and jury and should not have been there, and it was prejudicial to admit this testimony.

It was error for the Court to admit in evidence Government's Exhibit 210A in which the defendant was charged for the year 1946 with the receipt of income of $7,000. from one Phil Zahlout, in which the defendant was given no credit whatsoever for money borrowed from others and not repaid, (R. Tr. 733 to 736) and which also referred to the returns for 1947 and 1948. (The sum of $28,350. in the year 1947 - and $56,645, from one John O'Rourke in 1948, R. Tr. 306 to 307).

After the jury had the case submitted to them, on June 20th, 1951, the jury later requested that the testimony of the witness John O'Rourke be reread to them and that the checks of the witness O'Rourke be submitted to them for their inspection. Exhibit 210A reflected purported income when there was no evidence on which the government could have found such reflection.

Under Exhibit 210A, the defendant is charged in 1948 with receipt of $28,347.37 income from Palladino and Chapman. The only testimony on direct examination in the record respecting this source of alleged income is found on page 355 of the Reporters transcript, as follows:

"Q Mr. Lewis, do you know Rocky Palladino?

A I think I met the gentleman once or twice.

Q Do you know Mac Chipman?

A Probably met him maybe once or twice.

Q Where did those two gentlement have their place of business?

A I wouldn't know. I met them in New York. Maybe in a cafe, they were introduced to me, or something to that effect.

Q Do you know what their occupations are?

A Well, I knew them to own a cafe in Boston.

Q What was the name of that cafe?

A I wouldn't know.

Q Have you ever had any business transactions with them?

A None whatsoever.

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THE TRIAL COURT WAS GUILTY OF PREJUDICIAL MISCONDUCT IN THE TRIAL OF THE CASE.

In the presence of the jury, and while the defendant was on the witness stand on cross-examination by the United States Attorney, the trial Court made prejudicial remarks in the presence of the jury. It appears that the defendant was coming to court on different days not wearing the same clothes. The prosecutor said:

"Q Now, Mr. Cohen, let's look at this again -- we will go back.

THE WITNESS: Let's us look at it -- wait a minute. Why don't you want to look at the part

THE COURT: Just a moment.

THE WITNESS: He doesn't want to look at the part that says something.

THE COURT: You don't have to argue.

THE WITNESS: He wants to look at the part that makes it look good for him.

THE COURT: You will land in jail overnight if you don't do what I tell you to do.

THE WITNESS: I am sorry, your Honor.

THE COURT: You will be wearing the same suit tomorrow that you are wearing today. Just answer the questions and quit arguing."

The questions revolved around the transcript of testimony given in securing loans from Arthur Seltzer (R. 1806).

The remarks of the trial judge in the presence of the jury were highly improper and cast the weight of the court against the petition in the eyes of the jury.

A trial judge must be ever watchful that he does nothing to prejudice an accused in the presence of the jury (Bollenbach v. United States, 326 U.S. 607, 90 L. Ed. 354.) The court in that case said:

"The influence of the trial judge on the jury is necessarily and properly of great weight," citing from Starr v. United States, 153 U. S. 614, 38 L. Ed. 841.

And, see Williams v. United States, 93 Fed. (2d) 685

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THE PETITIONER WAS IMMUNE FROM PROSECUTION FOLLOWING HIS TESTIMONY BEFORE THE KEFAUVER COMMITTEE.

The petitioner herein was called as a witness before the Kefauver Committee at Los Angeles, California on November 17, 1950. Congress has provided in Title 18, Section 3486, as follows:

"§ 3486. Testimony before Congress; Immunity

No. testimony given by a witness before either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

During the hearings before the Kefauver Committee a Deputy United States Attorney sat throughout the proceedings and subsequently a prosecution resulted. Senator Kefauver, in various addresses and at various places, has stated that his investigation resulted in the indictment of the petitioner; yet the trial court refused to grant a Motion to Dismiss the Indictment and the petitioner was prosecuted, although the Congressional Committee chose to call him knowing that the effect of calling him would be to grant the petitioner immunity.

No case of this Honorable Court has passed upon the extent of immunity resulting from Section 3486, nor do we think Congress can compel testimony, as they did in the instant case, and at the same time

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proceed to prosecution on the theory that the testimony thus illicited was not used in the trial.

The Fifth Amendment to the Constitution of the United States forbids self-incrimination. Ever since Counselman v. Hitchcock, 142 U.S. 547, 35 L. Ed. 1110, it has been held that Congress may not pass a statute which compels self-incrimination. As said by Mr. Justice Roberts in United States v. Monia, 317 U.S. 424, the government may elect whether it is willing to pay the price of gathering information, and the occasions may be rare ones, but if it does so elect then the person who is questioned cannot be prosecuted.

Title 2, U.S.C.A., Sec. 192 (R.S., Section 102) contains statutory compulsion and makes one who refuses to testify before a committee of either House of Congress guilty of a misdemeanor punishable by a fine of not more than $1,000 nor less than $100, and imprisonment of not less than one month nor more than twelve months.

Section 3486 gives the witness immunity and it must be deemed under the Fifth Amendment to the Constitution of the United States that the immunity must be equal to the privilege sought to be preserved.

Counselman v. Hitchcock, 142 U.S. 547, 35 L. Ed. 1110;

United States v. Monia, 317 U.S. 424, 428, 434, 87 L. Ed. 276;

McGrain v. Daugherty, 273 U.S. 135, 168, 71 L. Ed. 580, 50 A.L.R. 1;

McCarthy v. Arndstein, 266 U.S. 34, 69 L.Ed. 158;
Rochin v. California, L.W. 4057, Decided Jan. 2, 1952.
Glickstein v. United States, 222 U.S. 139, 56 L. Ed. 128;

Borwn v. Walker, 161 U.S. 591, 40 L. Ed. 819.

"And, a statute is not adequate unless it grants complete immunity, 'in

all respects commensurate with the protection guaranteed by the constitutional limitation.'" (Glickstein v. United States, 222 U.S. 139,141, 156 L.Ed. 128).

No provision is contained in Section 3486 of Title 18 requiring one to claim the immunity as is contained in some statutes and referred to in Daisart Sportswear vs. United States and the petition of Smith v. United States, which this court reversed in a case.

It is a distinction without a difference to say that "a person may testify before a Congressional Committee and that the testimony cannot thereafter be used against him" and to say that he can still be prosecuted for the offenses surrounding which he has been fully questioned before such a committee. The government had its election and the Congressional Committee was well aware of the fact that the petitioner was under tax investigation. In fact, the very presence of a Deputy United States Attorney at the Kefauver hearings showed not only that it was done with full knowledge but with a pre-determined effort to get all the information possible at such hearing.

We respectfully submit that the government having elected to put the defendant on the stand and question him fully at such a hearing that immunity necessarily flowed under the Fifth Amendment to the Constitution of the United States, and that the Motion to Dismiss the Indictment made at the outset of the case on this ground should have been granted.

We respectfully submit that this question is one of fundamental importance. The once case we have been able to find touching on this subject is United States v. De Lorenzo, [redacted] Fed. (2d) 122, in which there

was a dissenting opinion written by Circuit Judge Clark in which Judge Clark said as follows:

"The witness, unlike an accused in a court of law, had no option to refuse to take the stand; and it is neither feasible nor fair to expect him to object to every question, notwithstanding compulsion thus direct. His chance reference to 'counsel' does not identify any person at the hearing or show what, if any, protection he got or could get from such quarter. Obviously all that any counsel could wisely tell him was that he must answer as the committee demanded and rely upon the immunity which the law gave him against any further consequences.

Next, if I understand the opinion correctly, it employs a view of immunity, even where gained, as applying only to the use of the actual testimony itself, a view which I had supposed was just what was repudiated in Counselman v. Hitchcock, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, and in all the cases since, e.g., United States v. Monia, 317 U.S. 424, 428-434, 63 S. Ct. 409, 87 L. Ed. 376; McGrain v. Daugherty, 273 U.S. 135, 168, 47 S. Ct. 319, 71 L. Ed. 580, 50 A.L.R. 1; McCarthy v. Arndstein, 266 U.S. 34, 45 S. Ct. 16, 69 L.Ed. 158; Glickstein v. United States, 222 U.S. 139, 32 S. Ct. 71, 56 L. Ed. 128; Brown v. Walker, 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819. Such a limited immunity does not satisfy the Fifth Amendment which protects an individual from giving evidence only tending to criminate himself, and applies to testimony which may merely furnish the background which leads to the ultimate conviction. And a statute is not adequate unless it grants

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complete immunity, 'in all respects commensurate with the protection guaranteed by the constitutional limitation.' Glickstein v. United States, supra, 222 U.S. 139, 141, 32 S. Ct. 71, 72, 156 L. Ed. 128. Hence it is no answer to say that the examiner had a background of facts sufficient to justify prosecution before he began his examination. In fact the examination was directed to procuring the witness' admissions and was successful in so doing--so much so that the chairman of the main committee immediately sent a transcript thereof to the appropriate prosecuting authorities with a strong request for prosecution, a request vigorously reiterated in the committee's final report. Admissions are, after all, the most convincing of evidence; at any rate they appear to have led here, perhaps almost inevitably, to the stipultation wherein the defendant conceded facts upon which the judge below based his finding of guilt of willful intent to defraud a governmental department.

Hence it does not seem to me that the application of the constitutional protection should be at all equivocal here. For this involves not only an important question of personal liberties, but also one going to the heart of the valuable investigative functions of Congress. It is to the public interest that the power to investigate be unhampered and that witnesses be induced, indeed forced, to testify with the complete protection which satisfies the constitutional intent, rather than be allowed to remain silent in reliance upon the constitutional prerogatives. It is desirable, therefore, that the statutory provisions be construed, if possible, to contain

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such immunity, rather than be held insufficient, with the privilege of refusing to testify then freely operative. There are difficulties in such interpretations, it is true, arising out of the history of the legislation, the statute is one where clarification must await the decision of the highest court. But for present purposes we need not decide finally whether the statutes are complete or not; for the force of the constitutional principle alone requires us to set aside a conviction based upon facts a witness was compelled to admit on his congressional examination."

United States v. De Lorenz, 151 F. (2d) 122, 127, 128.

The petitioner was a witness before the Kefauver Committee under Senate Resolution No. 202, (81st Congress) Investigation of Organized Crime in Interstate Commerce, authorizing investigation of crime in Interstate Commerce. Its authority was based upon the Interstate Commerce Clause/of the United States Constitution. Article 1, Section 8 The senate resolution therefore contemplated and / read into the proceeding all that was intended in connection with testimony given before the Interstate Commerce Commission and certainly must have intended to embrace the Compulsory Testimony Act, /of February 11, 1893, U.S.C. 1934 Edition, Title 49, Section 46 applies and must be read together with Section 3486 Title 18 of the Crim nal Code. The Compulsory Testimony Act

The Compulsory Testimony Act of Februay 11, 1893, 27 Stat 443, C. 83, 49 U.S.C.A. Section 4610(a), S.C.A. Title 49, Sec. 46 provides one of the Guides.

In Smith v. United States, 337 U. S. 137, at page 146 this court said:

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First . The evolution of congressional policy in dealing with immunity from criminal prosecution in return for evidence has been adequately discussed recently by this Court. United States v. Monia, 317 US 424, 87 L ed 376, 63 S. Ct. 409 (1943) and Shapiro v. United States, 335 US 1, 92 L ed 1787, 68 S. Ct. 1375 (1948). Through Counselman v. Hitchcock, 142 US 547, 35 L ed 1110, 12 S Ct 195, 3 Inters Com 816, it was established that absolute immunity from federal criminal prosecution for offenses disclosed by the evidence must be given a person compelled to testify after claim of privilege against self-incrimination. To meet that requirement Congress amended the immunity provisions of the Interstate Commerce Act [Feb 4, 1887] 24 Stat 378, 383, c 104, § 12, 49 USCA § 12, 10 A FCA title 49, § 12, that protected a witness from use against him of evidence so given in any subsequent criminal proceeding so as to provide that the witness should not be 'prosecuted . . . for or on account of any transaction, matter or thing, concerning which he may testify . . . .' P 1269 supra. This remission of responsibility for criminal acts met the constitutional provision against self-incrimination. Brown v. Walker, 161 US 591, 49 L ed 819, 16 S Ct 644, 5 Inters Com 369. If a witness could not be prosecuted on facts concerning which he testified, the witness could not fairly say he had been compelled in a criminal case to be a witness against himself. He might suffer disgrace and humiliation but such unfortunate results to him are outside of constitutional protection. Id. 161 US p 598, cf. pp 630, 631, 40 L ed 821, 832, 833, 16 S Ct 644, 5 Inters Com 369.

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This compulsory testimony statute was further amended in [June 30] 1906 to provide that the immunity should extend only to a natural person testifying under oath in obedience to a subpoena. 34 Stat 798, c 3920, 15 USCA § 33, 4 FCA title 15, § 33. The Monia Case, 317 US 424, 87 L ed 376, 63 S. Ct. 409 supra, decided in 1943 that it was not necessary for a witness to claim his privilege against self-incrimination under the compulsory testimony statute as thus amended. This conclusion was reached on an interpretation of the immunity statute, p 430, despite a contrary rule requiring a claim of privilege under the self-incrimination provision of the Fifth Amendment. See United States ex rel. Vajtauer v. Commissioner of Immigration, 273 US 103, 113, 71 L ed 560, 566, 47 S C t 302. Cf. Heike v. United States, 227 US 131, 57 L ed 450, 33 S Ct 226, Ann Cas 1914C 128.

In the light of these decisions adjusting a witness' duty to testimony to his constitutional protection against self-incrimination, Congress has been enabled, through the use of the Compulsory Testimony Act of 1893 as a model, to legislate so as to force from the lips of the guilty testimony believed necessary to administer a variety of acts. By the date of the Monia decision, 317 U. S. 424 Congress had, foresightedly, added to the standard immunity clause, drawn from the Interstate Commerce Act, the provision that the witness must claim his privilege. By this addition the statute on compulsory testimony as to this requirement was put on a parity with the constitutional privilege against self-incrimination. It is such a supplemented immunity statute that we are called upon

to apply in this case."

Read together, we submit that the petitioner in testifying before the Congressional Committee was granted not merely Congressional immunity but was granted immunity from prosecution in the matters about which he was questioned before the Congressional Committee. Anything less would destroy the guarantees of the Fifth Amendment to the Constitution of the United States.

We think this question is highly substantial and goes to the whole appeal in this case.

A motion to dismiss because of the testimony before the Kefauver Committee was made prior to trial, and again at the commencement of the case, (R. 87) and renewed again prior to sentence. (R. 2010).

CONCLUSION

These errors are substantial and raise fundamental questions of criminal law of importance and show that the appeal is highly substantial. We, therefore, respectfully renew our application for bail. We reassert:

(1) That Judge Denman's order was a valid order and determined the issues and that the other judges of the Court of Appeals were without power to revoke his order;

(2) That in any event Judge Denman's order was right because the case presents several substantial questions on appeal set out above, and

Finally, that the bail fixed by Judge Denman was reasonable and fair under all the circumstances.

Respectfully submitted,
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